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THE

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(CANADA)

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THE

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NORTH-WEST PROVINCES.

(EDMONTON.)

SCOTT, J. DECEMBER 3RD, 1906.

CHAMBERS.

RE MATEJKA.

Bankruptcy and Insolvency—Claims on Insolvent Estate—Priorities—Insolvent Carrying on Business with Consent of Majority of Creditors—Agreement—Claim for Price of Goods Supplied by Creditor—Preferred Claim—Wages of Insolvent—Remuneration of Assignee.

Summons obtained by John B. Anderson, the assignee for the benefit of creditors of Vaclav Matejka, an insolvent, for directions as to the winding-up of the estate, and for the determination of certain questions set out in the judgment.

J. E. Wallbridge, Edmonton, for the assignee and insolvent.

J. C. F. Bown, Edmonton, for N. W. Gould.

O. M. Biggar, Edmonton, for certain creditors.

SCOTT, J.:—The following questions are raised:—

1. As to what creditors, if any, are entitled to payment in full of their claims in priority over the other creditors.

2. As to whether the claim of Noah W. Gould for goods supplied to the insolvent after the assignment, under the circumstances hereinafter referred to, is entitled to priority over the claims of the other creditors.

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3. As to whether the claim of the insolvent for wages for managing the hotel business subsequent to the date of the assignment is entitled to priority over the claims of the other creditors.

4. As to whether the claim of E. T. Jacobs is entitled to such priority.

5. As to the remuneration to be allowed to the assignee.

As to the claim of N. W. Gould.

At a meeting of the creditors of the estate held on 15th October, 1904, Gould appeared and offered to supply the insolvent with all groceries, liquors, and cigars required to run the hotel business carried on by the insolvent for a period of 9 months, and to await payment of the same until the expiration of that time, on condition that the insolvent be granted a 9 months' extension by his creditors, they to be paid by dividends monthly in such amounts as would average 10 per cent. per month on their claims, and, by a resolution passed at that meeting, the opinion was expressed that this offer should be accepted, and the solicitor of the assignee was instructed to prepare an agreement embodying this offer, and procure its execution.

An agreement was afterwards drawn up, which provided that Gould should supply the insolvent with the groceries, liquors, and cigars necessary for the purpose of carrying on the hotel business for the period referred to, and, by way of security therefor, should receive a chattel mortgage upon the personal property in and about the hotel, subject to the assignment, the creditors agreeing to accept payment of their claims by the appropriation to them pro rata of the net earnings of the hotel business.

The agreement contained a proviso that it should become operative only after execution by all creditors having claims of $50 and upwards, within 30 days from its date, and a further proviso that it was intended to be executed by all the creditors, that it should be held in escrow by the assignee until so executed, but that he might waive execution by any of the creditors, should he think it in the interest of the creditors to do so.

The agreement was not signed by all the creditors, nor by all those having claims of $50 and upwards. It was signed, however, by a majority of the creditors, the claims of those

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signing it representing more than two-thirds of the total liabilities of the insolvent.

Notwithstanding the fact that the agreement was not signed by all the creditors, the arrangement which it provided for was carried out. The hotel business was carried on by the insolvent for the period referred to, or for at least a portion of it. Gould made advances of goods from time to time, and he now has a claim against the estate for a large amount for such advances.

The carrying on of the business was not profitable, and a loss appears to have been sustained.

Although, strictly speaking, the assignee was not justified under the trust of the assignment, in continuing the business without the consent of all the beneficiaries under the assignment, yet I think that, as it was the opinion of those of the creditors who had the greatest interest in the estate that the scheme would be profitable, and that all the creditors would thereby obtain payment of their claims in full, and as no creditor appears to have objected to it being so carried on, it would not be unreasonable to direct that any balances due to Gould for the advances so made by him in good faith should be paid to him in full in priority over the claims of the other creditors. I am bound to say, however, that it is with considerable hesitation that I make this order.

As to the claim of the insolvent for wages.

In my opinion, the insolvent is not entitled to claim against the estate for wages, for carrying on the hotel business. The term of the agreement to which he was a party shew that he is not so entitled.

As to the claim of E. T. Jacobs.

The application in respect of this claim was not argued, and I was informed that it had been adjusted.

As to the remuneration of the assignee.

The solicitor of the assignee informs me that the sale of the real estate to Wyld referred to in the affidavits filed proved abortive. As there is nothing before me to shew that the whole estate has been realized, or what amount has been realized, I cannot fix the remuneration.

The assignee may, without taking out a fresh summons, apply at any time to have it fixed.

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NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 6TH, 1906.

CHAMBERS.

REX v. HARRIS.

Liquor License Ordinance—Selling to Interdict—Conviction—Offence against sec. 122 (3)—Amendment of Statute—Effect of—Period of Interdiction—Penalty—Fine—Period of Imprisonment in Default of Payment—Forms—Criminal Code—Quashing Conviction.

Application by defendant to quash his conviction for selling liquor to an interdicted person, contrary to the provisions of sec. 122, clause 3, of the Liquor License Ordinance, C. O. ch. 89. The offence as alleged in the conviction was as follows: "For that he, the said James Harris, being then a licensee under the provisions of the Liquor License Ordinance, did unlawfully give to one Dan Campbell, an interdicted person, intoxicating liquor; he, the said James Harris, having at such time knowledge that the said Dan Campbell was an interdicted person, contrary to the provisions of section 122 of the Liquor License Ordinance." And then the conviction went on to adjudge that Harris for said offence should pay a fine of $50 and costs. No method was prescribed in the conviction for enforcing the penalty or costs, nor was it in any way stated what the consequence of default of payment of such fine and costs would be.

E. L. Elwood, Moosomin, for defendant.

E. A. C. McLorg, Moosomin, for the Attorney-General.

WETMORE, J.:—A number of objections were taken to this conviction; it is only necessary for me to deal with two of them, namely, first, that the conviction does not disclose on its face any offence against clause 3 of sec. 122 of the Ordinance; second, that it does not prescribe any method of enforcing the payment of the fine or costs, or state what the consequences of default in payment of such fine and costs would be.

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Clause 3 of the section of the Ordinance in question, as it originally stood in the Consolidated Ordinances, was as follows: "Whenever the sale of liquor to any such drunkard shall have been so prohibited, any person with a knowledge of such prohibition who gives, sells, purchases, or procures for or on behalf of such prohibited person or for his or her use any liquor, such other person shall be guilty of an offence, and upon summary conviction thereof be liable to incur for every such offence a penalty not less than $50 nor more than $200, and, in default of payment forthwith after conviction, to not less than two months' nor more than twelve months' imprisonment, and if a licensee his license shall be forfeited." This clause was amended by sec. 19 of ch. 32 of 1900 by striking out the words "such other person" and substituting therefor the words "during the period of such prohibition." The offence now, therefore, is "with a knowledge of the prohibition to give, etc., to such prohibited person any liquor during the period of such prohibition." The legislature must have had some object in making this change, and the only object I can perceive is that the section might be open to the construction that if liquor should have been prohibited to any person a person with knowledge of the prohibition giving, etc., liquor to such prohibited person would commit an offence at any time thereafter, whether the prohibition had expired or not. It seems to me, therefore, that the conviction must be brought within such intention, and it must appear upon its face that the offence provided for by the clause was committed; that is, that the liquor was given within the period of the prohibition.

As to the other ground, the section, it will be perceived, provides a penalty of "not less than $50 nor more than $200, and, in default of payment forthwith after conviction, of not less than two months' nor more than twelve months' imprisonment." I am of opinion that the conviction ought to have stated the period for which the party convicted would be imprisoned if the fine was not paid. Section 104 of ch. 89 provides that the forms in the schedule or forms to the like effect "shall be sufficient in the cases thereby respectively provided for; and when no forms are prescribed by the said schedule they may be framed in accordance with part 58 of the Criminal Code, 1892." General forms of conviction are provided for in the schedules to this Ordinance, namely, forms P and Q, pp. 870, 871. This offence is a first offence, and form P is a form of conviction for a first offence. That

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form is prescribed, however, for cases where a distress warrant is to be issued in default of payment, and in default of sufficient property to distrain imprisonment is to follow. There is no form prescribed in the Ordinance for a case like the present, where imprisonment is provided in default of payment of the penalty, therefore we must have recourse to the forms prescribed in the Criminal Code, 1892. In that we find Form W, in schedule 1, at p. 341, which is a form of conviction where imprisonment is awarded in default of payment of the penalty. That form provides for adjudging the term of such imprisonment.

I am of opinion that this conviction is bad on both these grounds and must be quashed. No application has been made to amend in this case, and if it had been I doubt whether I could have amended. I am inclined to the opinion that where I am called upon to exercise a discretion of the character of fixing the term of imprisonment I am unable to amend. I am also inclined to the opinion, in view of its wording, that the provision in the clause 3 in question providing for imprisonment is not merely a means of enforcing the penalty, but provides an alternative punishment in case the penalty is not paid. I express no decided opinion on that question however.

MANITOBA.

MATHERS, J. DECEMBER 5TH, 1906.

TRIAL.

REX v. DOUGLAS.

Criminal Law — Procedure — Method of Trial—Election — Trial without Jury—Addition of New Charges—Consent —Motion to Quash Indictment.

Application to quash an indictment.

J. A. M. Aikins, K.C., and C. P. Fullerton, for prisoner.

N. T. Hagel, K.C., and R. A. Bonnar, for the Crown and private prosecutor.

MATHERS, J.:—On 23rd March, 1906, the accused was arrested upon an information charging him with having on or about 11th November, 1904, unlawfully, "knowing the existence of an unregistered prior sale of real property, to

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wit (describing it), in the province of Manitoba, fraudulently mortgaged the above described real property, to which he knew he had no legal or equitable title," and also that "at the place and on the day and year aforesaid, did unlawfully obtain by false pretences the sum of $17,690 from the Landed Banking and Loan Company, with intent to defraud."

On 2nd April, 1906, before the preliminary investigation was proceeded with by the magistrate, another information was laid against the accused charging him with stealing on 25th February, 1903, $1,000 and title deeds to the value of $3,000; also with having stolen $1,000 on 1st October, 1903, and $3,175, on the 28th February, 1904. In this information the accused was also charged with having on 28th February, 1903, unlawfully, by false pretences, caused and induced George Worsley to execute or make a valuable security, to wit, a promissory note for $3,175, with intent thereby to defraud and injure the said George Worsley, and with having, on the same date, unlawfully, by false pretences, caused or induced the same person to execute and make a certain valuable security, to wit, a promissory note for $2,000, with the same intent.

After hearing the evidence the magistrate bound the accused over under sec. 601 of the Code to appear at the next superior court of criminal jurisdiction and plead to the indictment that might be found against him "for and in respect to the charge aforesaid." The only charge mentioned in the condition of the recognizance is the one which I have just mentioned, of having fraudulently mortgaged real estate.

Subsequently, the accused, having surrendered to the custody of the sheriff, was brought before the Chief Justice, and elected to be tried speedily before a Judge without a jury.

Upon the trial of the accused the Crown preferred an indictment, which, in addition to the charge upon which he was bound over by the magistrate, also contained 8 other counts, 3 for theft, 2 for obtaining a valuable security by false pretences, one for having fraudulently made a sale of real property, knowing of the existence of a prior unregistered sale, one for obtaining money under false pretences, and another for conspiracy to defraud. The consent of the Chief Justice to prefer these additional charges was not obtained under sec. 773 of the Code, and the accused has not waived his right to the trial of such additional charges by a jury.

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I think it clear from such cases as Regina v. Goodman, 3 O. R. 18, and Rex v. Carrier, 14 Man. L. R. 52, that the accused must waive his right to a trial by jury upon such additional charges before he can be tried upon them by a Judge. Upon all charges on which he has not elected to be tried by a Judge, he has a right to trial by jury. The judgment in the Carrier case is distinct, that leave should not be granted by a Judge, under sec. 773, for the addition of charges substantially different, without the consent of the accused; this I take to mean, without his having elected to be so tried.

The case appears to me to resolve itself into this. The normal mode of trial of all indictable offences is by jury. In the case of certain offences the accused may elect to be tried by a Judge without a jury, but he cannot be compelled to take such a trial. In the present case the accused has elected to be tried by a Judge upon one charge, and, having done so, his right to trial by jury upon that charge is gone, and he must be tried by a Judge. Upon the charges sought to be added he has made no election, and, unless he now elects to be tried upon these additional charges by a Judge without a jury, following Rex v. Carrier I must refuse to add them to the indictment.

Counsel for the Crown offered to waive all objections to the accused now re-electing upon the charge on which he was bound over, but it seems to me the rights of an accused person depend upon what the law grants or withholds from him, and not upon the consent of the prosecuting counsel.

MANITOBA.

MATHERS, J. DECEMBER 7TH, 1906.

TRIAL.

MOORE v. SCOTT.

Promissory Note—Interest Payable by Instalments before Date for Payment of Principal—Indorsement to Plaintiff after one Instalment Due and Unpaid—Notice of Dishonour—Not Holder in Due Course—Note Obtained by Fraud—Sale of Horse—Election to Rescind—Offer of Restitution—Pleading—Amendment of Defence of Fraud.

In October, 1902, one Morris, an agent of McLaughlin Bros., horse dealers, of Columbus, Ohio, and of Minneapolis,

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Minnesota, went to Swan Lake, in the province of Manitoba, with what he alleged to be a Percheron stallion named "Charlot." He was armed with a pedigree purporting to be the pedigree of the horse he had brought with him and numerous printed copies, embellished with what was alleged to be the horse's photograph. The printed pedigrees had, on the back thereof, the name "McLaughlin Bros., importers of draft and coach stallions, Columbus, Ohio," and these documents were furnished by McLaughlin Bros. to their agent Morris, to be used by him in effecting a sale of the horse.

Morris, upon his arrival at Swan Lake, placed the horse in a livery stable and proceeded to canvass the farmers of the district, for the purpose of forming a syndicate to purchase it. He fixed the price at $3,500, and the syndicate was to consist of 14 persons, each having one share of $250 in the horse. In order to assist him in inducing farmers to join the syndicate, Morris employed defendant Scott to go around with him, and after about two weeks the defendants in this action were induced to sign an agreement.

It was stated in the pedigree that the horse had been foaled on 20th March, 1896, which would make his age at that time about 6½ years, and to each of the defendants Morris represented that the stallion was a young horse, 6 years old, and it was upon the faith of what appeared in the pedigree and what Morris said, as to the horse's age, that defendants consented to become purchasers. On 27th October, 1902, the transaction was completed. On that day defendants signed and delivered to Morris joint and several promissory notes, to the amount of $3,500, payable to the order of McLaughlin Bros., and each received a certificate bearing the name McLaughlin Bros., that he was entitled to one share of $250 "in the imported Percheron stallion named Charlot." Morris, at the time, signed in the name of McLaughlin Bros. "per J. A. Morris, agent," and delivered, what he termed a bill of sale of the horse.

Defendants then held a meeting and signed a printed syndicate agreement, produced by Morris, providing for organization as the "Swan Lake Percheron Horse Company," the officers by which it was to be controlled, their duties, and the distribution of the horse's earnings.

The defendant Scott was appointed manager, and the defendant Hawkins secretary. Scott took charge of the animal and placed it in his stable. During that fall, or

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the following winter, it took sick, and during the season of 1903 it again took sick and had to be taken off the road. In the spring of 1904 it had another attack of sickness, and on 9th September of that same year it died, at the end of several weeks' illness.

This action was brought by plaintiff as indorsee of a note for $1,166.66, dated at Swan Lake on 27th October, 1902, signed by all the defendants in favour of McLaughlin Bros. or order, payable on 1st December, 1904. This was the first to fall due of the several notes aggregating $3,500 given by defendants for the horse.

Defendants defended on the ground that plaintiff was not the holder in due course of the note, and that they were induced to sign the note by the fraudulent representation of the agent Morris that the horse was a pure bred Percheron named Charlot of the age of 6 years, whereas the animal sold was not the registered horse Charlot but was a much older horse, as McLaughlin Bros. and the agent Morris well know.

C. P. Wilson and J. F. Fisher, for plaintiff.

A. J. Andrews and H. A. Burbidge, for defendants.

MATHERS, J.:—I am satisfied, beyond all doubt, that the horse sold to defendants was not the horse "Charlot" named in the pedigree produced, but was an old horse not less than 13 years of age and probably more, and that this fact was well known to both Morris and McLaughlin Bros., when the sale was made. It is difficult to conceive a more gross or deliberate fraud than that which Morris perpetrated upon defendants. But it was not the fraud of the agent alone. I am satisfied that the fraudulent scheme was concocted by McLaughlin Bros., and that Morris was only their willing tool to carry the scheme into execution. What these people did, was to take the real and true pedigree of the horse Charlot, a horse 6½ years old, and substitute an old horse, and, by falsely and fraudulently representing that this horse was the horse "Charlot," induce these defendants to buy him at $3,500.

But it is said that plaintiff is an innocent holder in due course of the note sued on, and, even if it was procured by fraud, he can recover the amount from defendants, leaving it open to them to pursue their remedy against the fraudulent payee. But is plaintiff a holder in due course?

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To be a holder in due course, within sec. 29 of the Bills of Exchange Act, the note must be complete and regular on its face, and it must appear that plaintiff became the holder before it was overdue and without notice that it had been previously dishonoured, if such was the fact, and that he took it in good faith and for value, and that at the time the note was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

The note in question is dated 27th October, 1902, and is payable on 1st December, 1904, "with interest at 7 per cent. per annum, interest payable annually." On 27th October, 1903, one annual payment of interest, amounting to $81.66, fell due, and another payment of like amount would fall due on the 27th October, 1904. Two annual payments of interest would therefore fall due before the maturity of the principal on 1st December, 1904. Plaintiff did not become the holder of the note until October, 1904, so that at least one payment of interest had accrued almost a year before. I am satisfied that the overdue interest had not been paid, and that plaintiff had notice of that fact. By his statement of claim plaintiff claims interest from 22nd October, 1902. In doing so he has evidently mistaken the date of the note for 22nd instead of 27th October. His doing so is only consistent with a belief that the interest had not been paid.

In the majority of the United States the Courts hold that interest is a mere incident, and that its non-payment does not dishonour the note, but there are some very respectable authorities which adopt the contrary doctrine. The only English or Canadian authority to which counsel on either side were able to refer me was the decision of a County Court Judge in Ontario, and my own research has not been rewarded with any better results. The case to which I refer is Jennings v. Napanee Brush Co., 4 C. L. T. 595, decided by the late Judge McDougall, Judge of the County Court of York. The case was argued before him by able counsel, and, in a lengthy judgment, he carefully reviewed the authorities both English and United States, and came to the conclusion that interest is more than a mere incident to the note where payment of interest is therein provided for, and that non-payment of an instalment did dishonour the note. Judge McDougall was a very able Judge of wide experience, and his considered judgment is entitled to great respect. On principle, I cannot see why interest, which is provided for by the contract, should be described as a mere incident to the

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principal. It seems to me it is as much a part of the contract as the principal itself, and that the same consequences should follow from default in payment of interest, that follow from default in payment of an instalment of principal. I am, therefore, of opinion, that the note had been dishonoured before plaintiff became the holder, of which fact he had notice, and that he is consequently not a holder in due course.

It was contended by plaintiff that after defendants discovered the fraud, they elected not to rescind the contract. This contention is based on the evidence of defendants Scott and Hawkins. They had been told that the horse was an old horse, as early in the spring as 1903, but they did not believe it, as they relied upon the pedigree, which gave the age as 6½ years. On an examination of the pedigree it appeared that the name of the horse was written in a different hand from the body of the document. This, taken with what he had been told, excited in the mind of Scott a suspicion that they had been defrauded, but I cannot find that it amounted then to more than a suspicion. They then set to work to trace the pedigree, evidently believing that the horse they had got was Charlot, but suspecting that his age had been wrongly stated in the pedigree. After considerable difficulty and the lapse of a great deal of time, a reply was obtained from the "Société Hippique Percheronne de France" to the effect that the pedigree was the correct pedigree of "Charlot." This was not, however, until after the horse had died. After the horse's death and before receiving this communication, the defendant Scott submitted its head to Dr. Torrance of Winnipeg and Dr. McGillivray, and their opinion confirmed what had before been told him as to the horse being at least 12 years of age, and probably much older. From a careful reading of the evidence, I find that defendants were not convinced that the horse was an old horse until after Dr. Torrance's opinion had been obtained, and they did not know that it was not Charlot, but an entirely different horse, that had been sold them, until they received the letter from the French Percheron Society. Then, and not till then, did they realize the whole character and magnitude of the fraud that had been perpetrated upon them. It is true that as early as the spring of 1903 the defendant Scott was told by Dr. McGillivray that the animal was old, and, had he believed that statement, I think defendants' subsequent dealing with the horse would have been conclusive evidence of an elec-

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tion to go on with the contract, notwithstanding the fraud, and the right of rescission would be gone. But McLaughlin Bros. had been represented to them as men of irreproachable integrity, and they had, besides, been furnished with a printed pedigree, in which the horse's age was given as 6½ years, and they declined to believe that they had been imposed upon. I do not think it lies in the mouth of McLaughlin Bros., or the plaintiff, to say that they were not justified in doing so. Later on, when others, who ought to know, confirmed Dr. McGillivray's statement, they became gravely suspicious and began to search for evidence, but, before their suspicious were confirmed, the horse had died.

As stated in Kerr on Frauds, p. 233, "A purchaser is not bound to be suspicious." Even if notice of the true state of facts was received, the purchasers were not bound to at once rescind, under penalty of having the transaction confirmed. They were entitled to time to make inquiries: New Sombrero Phosphate Co. v. Erlanger, [1894] 1 Ch. at p. 117. It does not appear to me that anything occurred before the death of the horse, to preclude defendants from rescinding the contract.

The general rule unquestionably is, that before there can be rescission there must be a restitutio in integrum, but the rule has a number of exceptions, one of which is stated by Baron Bramwell in Head v. Tattersall, L. R. 7 Ex. at p. 12, as follows: "The buyer must return the horse in the same condition as when he bought it, subject to any of those incidents to which the horse may be liable, either from its inherent nature, or in the course of the exercise by the buyer of those rights over it which the contract gave. . . . The case of a horse dying was also put to us. But there, if the death occurs through some natural disease, or without the purchaser's default, is he to be without a remedy? It may be answered that he might have his action on the warranty. However that might be, I am disposed to think that, even in such a case, the contract might still be rescinded just in the same way as I think it could be, if the horse were to be left at the vendor's by his permission after the sale, and were to die there."

I cannot find that the death of the horse in this case was due to any default on the part of defendants. I therefore hold that defendants are entitled to rescind, notwithstanding that they cannot now restore the horse.

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It remains to consider defendants' pleading, and I may say, at once, that I think the pleading defective. In addition to alleging the fraud, the defence should also have alleged that, upon discovering the fraud, defendants rescinded the contract and restored the horse, or—in this case—alleged that it had before discovery of the fraud died from natural disease, without defendants' fault, and that restitution had, therefore, become impossible. As the defence does not set up either rescission, or restitution, or any excuse for not restoring, it is, in my opinion, clearly bad, and, without amendment, plaintiff would be entitled to judgment. Counsel for defendants at one stage of the trial intimated that an amendment would not be asked for, apparently being under the impression that a plea of fraud could not be amended. Later counsel asked for an amendment, if I should hold the defence defective. The rule is strict, that, if fraud is not set up in the first place, the Court will not allow an allegation of fraud to be introduced by amendment except under very exceptional circumstances, but the same strictness does not apply to so amending a plea of fraud, already on the record, so as to make it a good plea. As the whole question of rescission and restitution was fully gone into in the evidence, I think the amendment should be allowed.

It was pointed out that there is no evidence of election to rescind, but a plea of fraud is a sufficient determination of election to avoid the contract, although there was no declaration of intent to rescind before the time of pleading: Morrison v. Universal Ins. Co., L. R. 8 Ex. 204.

The action must be dismissed with costs.

MANITOBA.

MACDONALD, J. AUGUST 23RD, 1906.

SINGLE JUDGE'S COURT.

COTTER v. OSBORNE.

Master and Servant—Inducing Servant to Break Contract with Master—Interference between Masters and Servants —Strike—Injunction—Scope of.

Motion by plaintiffs (master plumbers) to continue an interim injunction restraining defendants (striking plumbers)

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from interfering in any manner with the non-strikers in the performance of their duties.

J. E. O'Connor, for plaintiffs.

H. W. H. Knott, for defendants.

MACDONALD, J.:—Defendants oppose the application for a continuance of the injunction granted herein, on two grounds:—

1st. That strikes being legal, the strikers may, by lawful means, prevent others from working.

2nd. That the language of the injunction is too wide, and that it does not state precisely what is enjoined, but is general in its terms.

Allowing that strikes are legal and that strikers may, by lawful means, prevent others from working, have the strikers in this case kept within the bounds of lawful means to accomplish the object of the strike? I must conclude, from the evidence before me, and for the purposes of this application I must accept that evidence as true, that they have not.

Inducing a servant to break his contract with his master is an actionable wrong, and it is no excuse that such conduct is not actuated by ill-will to the master.

Mr. Gate swears to a contract with an employee of 1st September, 1905, for one year, and the inducement by defendants Murray and Frank Simmonds to have him violate that contract. This conduct is clearly actionable.

The statement of claim, which is, in part, supported by the affidavit filed, charges a conspiracy and combination on the part of defendants to procure and induce the workmen of plaintiffs who were not on strike to leave the employ of the plaintiffs and to cause and induce divers workmen to refrain from entering their employ.

"A combination not to work is one thing and is lawful, but combination to prevent others from working by annoying them, if they do so, is a very different thing, and is prima facie unlawful:" Quinn v. Leatham, [1901] A. C. 538.

The evidence before me shews that there was some annoyance to workmen who were not on strike and efforts made to prevent others from entering the employment of plaintiffs.

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After a careful perusal of the statement of claim and the affidavits and exhibits filed on behalf of the plaintiffs, and upon looking into the authorities quoted, I have no hesitation in concluding that the injunction must continue until the trial of the action.

The objection that the language of the injunction is too wide and general in its terms cannot prevail; it is sufficiently precise, and there cannot be any doubt about what is enjoined.

I think, however, the exception referred to by Mr. Knott, that is, "except for the purpose of obtaining and communicating information," should be added, and the injunction amended in that particular.

MANITOBA.

MACDONALD, J. DECEMBER 11TH, 1906.

TRIAL.

MARTEL v. MITCHELL.

Trading Company—Mortgage—Sale of Business—Action to Set aside—Creditors — Security—Shares of Company's Stock.

Action by W. A. Martel sr. and W. A. Martel jr., plaintiffs, against J. F. Mitchell, Martels Limited, the Canadian Engraving and Publishing Co., Limited, and the Voice Publishing Co., Limited, defendants, to set aside a mortgage executed by defendants Martels Limited in favour of defendant Mitchell, and also to set aside the sale by defendants Martels Limited of their business to defendants the Voice Publishing Co.

A. J. Andrews and R. M. Noble, for plaintiffs.

A. E. Hoskin, for defendants Martels Limited.

J. B. Hugg and W. C. Kelly, for defendants the Voice Publishing Co.

MACDONALD, J.:—In September, 1904, plaintiffs carried on business in the city of Winnipeg as engravers and pub-

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lishers, and also a photographic business in the city of Brandon, and entered into an agreement with Ernest H. Beaufort and Richard H. McDonald for the sale to them of all the aforesaid business for the sum of $24,953, taking in payment $10,707 in cash and $14,246 in fully paid up shares in a company to be incorporated by Beaufort and McDonald under the Manitoba Joint Stock Companies Act, with a nominal capital of $100,000.

Preliminary steps were taken for the incorporation of the company, a board of directors obtained, and a prospectus issued, the name of the company to be "Martels Limited."

The agreement with Beaufort and McDonald fell through, and, by agreement in writing, was wholly cancelled, the reason assigned by Beaufort and McDonald for their inability to carry out their agreement being difficulty in selling stock through hostility against the Martels.

At the time of the execution of the release referred to, it was suggested to Martel sr. that he should continue the incorporation proceedings and form a joint stock company, and, acting on such suggestion, he did so, the directorate named in the prospectus issued by Beaufort and McDonald, with one exception, agreeing to become shareholders and continue on the directorate. The value of the shares was $10 per share.

After the issue of the charter a meeting of the provisional directors was called, and at that meeting the business of W. A. Martel & Son was taken over by the new company at the price of $24,950, of which $10,700 was to be paid in cash and the balance in paid up stock in the company.

W. A. Martel sr. was elected the managing director, and, he being the largest shareholder, the success of the company almost altogether depended upon his management.

The defendant Mitchell became a shareholder for 10 shares immediately upon issue of the charter, he having agreed to become a shareholder prior to the issue of the charter.

Under the management of W. A. Martel sr., a large quantity of plant was purchased for the purpose of the business and on the credit of the company.

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In due course the notes given for such plant fell due, and the company found a pressing necessity for money. The business had, prior to this, been carried on with money received from shareholders and borrowed money; a loan of $3,000 was arranged with the Eastern Townships Bank, and advanced on the note of the company, with the indorsement of W. A. Martel sr.

In May, 1905, the company found itself again in need of money, and a further advance of $3,000 was arranged with the Eastern Townships Bank, the bank taking the book debts and unpaid stock as security.

The company being indebted to W. A. Martel & Son for $10,700, the bank insisted that as against it they should not be creditors, and proposed to have what was due them issued into shares and handed to the bank as collateral security, which was done.

In 1905 Martel sr. resigned the position of managing director, owing, as he stated, to the fact that he received no financial assistance from the directors.

W. A. Martel jr. was then appointed manager, and under him the financial conditions did not improve, and then defendant Mitchell appeared on the scene and was appointed managing director. Under him matters did not change, and a meeting was called to devise ways and means. A sale of the business was discussed, then a scheme was proposed to mortgage the plant for $15,000, pay off the bank's claim of $14,000, and leave $1,000 in the treasury, and secure an extension of time from other creditors.

The plant was mortgaged to defendant Mitchell at the request and subject to the approval of the directors, and he indorsed a note for that amount and secured an advance of $15,000 from the Eastern Townships Bank. The creditors of the company indorsed this action.

The business then continued under the management of defendant Mitchell, and efforts were made to collect on the unpaid stock, which efforts were unavailing. Time for payment under the extension agreement with creditors was approaching. The bank was demanding payment of a part of its claim, and the company was forced to extreme measures, and a sale of the business was suggested and tenders asked for, and a number of tenders were received.

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the highest being that of defendants the Voice Publishing Company, Limited.

After receipt of these tenders, a meeting of the directors was called and tenders discussed; as a result the business was advertised in three daily papers, no further tenders were received, and a meeting of the creditors was called, and at such meeting the sale to the Voice Publishing Company was not opposed, and at a subsequent meeting of the directors the sale was ratified and completed.

I am asked to find that the mortgage in favour of defendant Mitchell should be declared void, and that it may be delivered up and cancelled. I cannot do this, as I believe the directors acted bona fide and in the best interests of the company.

I am further asked to find that the sale to defendants the Voice Publishing Company be declared void. This I cannot do; the evidence would not justify my doing so; and the action as against that company and defendant Mitchell is dismissed with costs.

I find that plaintiffs were to be paid $10,700 in cash on account of the transfer of the plant and stock of F. A. Martel & Sons to the defendants Martels Limited; that the Eastern Townships Bank insisted on such claim being placed in such a position that, so far as the bank was concerned, plaintiffs could not rank as creditors of the company for the amount, and to facilitate the company to obtain the accommodation required, plaintiffs, at the request of the company, consented to accept, for temporary purposes only, shares of the stock of the company amounting to $10,700—$2,000 of which, by arrangement between plaintiffs and the company, issued in the name of F. A. Martel, and $8,700 in the name of plaintiffs, and the said shares, amounting to $8,700, were deposited with the bank as further security for the indebtedness of the company to the bank.

This indebtedness having been paid off, plaintiffs are entitled to be restored to their original position with respect to these shares.

The defendants Martels Limited, having paid $2,300 of the indebtedness of the plaintiffs to the Eastern Townships Bank, are entitled to credit for that amount.

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There will be a verdict for plaintiffs against defendants Martels Limited for $6,400 or for $8,400, on surrendering by them to the Court at the time of entering judgment of the $2,000 in shares issued in the name of F. A. Martel, together with costs.

MANITOBA.

MACDONALD, J. DECEMBER 14TH, 1906.

TRIAL.

NAGY v. MANITOBA FREE PRESS CO.

Defamation — Injury to Property by Publication of Statements Referring to it—Haunted House—Cause of Action —Proof of Damage—Liability of Defendants.

Action for damages for the publication in defendants' newspaper of statements injurious to the value of property owned by Rachael M. G. Nagy, the plaintiff.

J. E. O'Connor and J. H. Leech, for plaintiff.

A. B. Hudson and E. L. Howell, for defendants.

MACDONALD, J.:—This is an action unique in the legal annals of British courts of justice, and a thorough research fails to disclose one of a parallel character.

The plaintiff was, at the time of the bringing of the action, the owner of a portion of lot 43 of the parish of St. John, upon which there was situate a brick residence facing on St. John's avenue, near to Main street, in the city of Winnipeg.

At the time of the commencement of the action and for 6 months previously the house was vacant, and was during that time advertised for sale.

On 22nd October, 1905, at 12.30 a.m., the following entry was made by one of the city police force in a book kept in the police station and known as the "occurrence book:" "Second house east of Main, on St. John's avenue, is believed by some people to be haunted at night between 11

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and 12 midnight; there are parties of men hanging around this house, also in basement, awaiting the appearance of the spook; this house is at present unoccupied. The Northern Fuel Company are the agents of this house." On 23rd October, 1905, the defendants published in the morning and evening editions of their newspaper, and in the weekly issue of 25th October, the following article which is the subject matter and cause of this action.

"A NORTH END GHOST.

"There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John's avenue near to Main. He appears late at night, and performs strange antics, so that timid people give the place a wide berth.

"A number of men have lately made a stand against ghosts in general, and at night they rendezvous in the basement and close around the haunted house to await his ghostship, but so far he still remains at large."

By reason of the publication of this article plaintiff alleged she had lost a sale of the property, which she had made to one Dr. Kelly, at the price of $11,000, and had otherwise sustained damage, and brought this action to recover $10,000. . . .

At the time of the commencement of the action the property was under mortgage to three different mortgagees, aggregating $4,500, and since the bringing of the action plaintiff transferred the property, subject to the mortgages, to Mr. A. J. Andrews.

The only evidence of a loss of a sale by reason of the article referred to is that of Dr. W. J. Kelly, who negotiated with and purchased from plaintiff early in October, 1905, at the price of $11,000, paying $250 down, $4,750 to be paid on 23rd October, 1905, the purchaser assuming the mortgages against the property, and the balance to be paid in two yearly payments.

'Tis worthy of comment as a coincidence that the entry in the police records is in the early morning of 22nd October, and the article in question published in defendants' newspapers on 23rd October, the date upon which the $4,750 instalment of purchase money is due by Dr. Kelly.

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The latter says he did not carry out the deal because of a report of the house being haunted, and that he read the article in the "Free Press;" that this was the main reason why he would not buy; he wanted the property for the purposes of a private hospital, and feared that timid people would not care to occupy it.

In cross-examination, however, this witness says that the above was the reason he gave Pugh, the plaintiff's agent in the sale of the property, but the real reason was that he had changed his mind, and that the ghost story would not have changed his mind; he wanted to go to the Coast.

This witness had also examined the property before he had approached Pugh with an offer of purchase; he went to the house and found the doors open to the general public and went in and examined it, and in the month of September he called upon Pugh and inquired about the property; he again visited the property early in October, and found doors unlocked as before; after this inspection he purchased the property, and paid his deposit, but beyond a receipt for the payment of the deposit no other steps were taken to complete the sale, and he refused to carry it out.

Edward Hodgins was another prospective purchaser, and he says he thinks he made an offer for it, and asked Pugh if he would take $11,000 for it, that is, if he could sell his own property where he lived; he failed in selling his own; he saw the article in question, but says that it did not affect the value of the house, and that the house is just as valuable now as before the article; he would have bought at $11,000 for himself, but not as a speculation because of the article in question affecting it with some people.

Charles Edward Drewry lives near the property; he noticed school children looking in the windows before publication of article in question, and he says he read the article in both the "Free Press" and the "Telegram."

Mr. Andrews, who is the present registered owner of the property, was offered $6,000 or $7,000 for it since the publication of the article in question, but refused the offer.

A number of witnesses deposed that, in their opinion, the article referred to would prejudicially affect the property.

The above are the facts upon which plaintiff seeks to recover damages.

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I find that the article in question refers to the property of plaintiff, as described in the pleadings.

It is contended on behalf of defendants that an action does not lie for slander of real estate, nor, indeed, can I find any authority that such an action does lie.

On the other hand, it is urged by plaintiff that the action is analogous to an action for slander of title, which is an action for special damage by a false and malicious statement affecting title to property, and to support this action the statement must be false, and the damage must have arisen from the words uttered. Analogous to the action of slander of title is an action on the case for publishing without lawful occasion an untrue statement disparaging a man's goods, and thereby causing him special damage, but nowhere can I find any authority for an action for slander of real property.

The reasons giving rise to actions for slander of title or for slander of goods can be readily seen because of the difficulty in proving the falsity of the charge. Titles in the days when actions for slander of title were more common, were more complicated and difficult of proof than in the present day, when a system of registration is in vogue, and actions of this kind are now-a-days uncommon because of the facility offered for establishing titles.

Slander of goods is not so easily met, because of the difficulty in convincing the public of the falsity of the charge; to say that certain goods are composed in part of ingredients that are poisonous or unwholesome is a difficult charge to disabuse the minds of the people of the truth of it.

But a statement reflecting on real estate is one that can be met at once by an investigation of the property, and any suspicions aroused by such statement immediately allayed.

In this case, however, it can be said that an investigation of the property alleged to be defamed will not reveal the falsity of the charge.

One can imagine in the days of conjurations, enchantments, and witchcraft, when these and like superstitions were rife, actions founded on such a statement as contained in the article in question being in evidence, yet we find none,

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but in this enlightened age and generation and in this modern city of Winnipeg to find that such an article is a slander would be a calumny upon its people.

Assuming, however, that the article in question is actionable, I find myself unable to saddle the damages upon the defendants.

People were attracted to the house in question for causes not explained, for some time previous to the entry in the occurrence book kept by the police; the house, being left open, as stated by Dr. Kelly, would be a convenient resort for vagabonds and tramps, and the hour of night when the people gathered would be the likely time for such a retreat being used.

The entry in the occurrence book referred to preceded the publication by defendants of the article the subject of this action.

The article was read in another newspaper as well as in that published by defendants . . . and to find defendants liable, it is necessary to prove damage in fact and not in imagination.

On all points mentioned plaintiff must fail, and I dismiss the action with costs.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 5TH, 1906.

TRIAL.

ANDERSON v. OSBORNE.

Contract—Supply of Material for Building—Mistake in Tender—Evidence of other Tenders—Admissibility—Rectification of Contract—Pleading—Amendment—New Cause of Action—Costs.

Action for the price of lumber and lime sold and delivered by plaintiff to defendant.

J. T. Brown, Moosomin, for plaintiff.

E. A. C. McLorg, Moosomin, for defendant.

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WETMORE, J.:—The defendant pleaded that a number of the goods referred to in the statement of claim were not delivered, and that he did not agree to pay the prices charged therefor; and in the alternative he pleaded that plaintiff, in consideration of $464.88, agreed to furnish defendant with lumber, particulars of which are set out in the statement of defence, partly from his own stock and partly by orders on other lumber merchants, namely, John Hind and W. H. Barton, which offer the defendant orally accepted; and that defendant had paid from time to time certain sums specified in the defence to John Hind for lumber supplied by him on behalf of plaintiff, and before action brought tendered plaintiff $32.80, which was sufficient to satisfy the balance of plaintiff's claim. No question arises with respect to the lime. I have referred to all the statement of defence that is material to the questions raised in this case.

Plaintiff in his reply joined issue to defendant's statement of defence, and also pleaded the following:—"2. That he, the plaintiff, is a lumber merchant residing at Fleming, in the province of Saskatchewan, and defendant is a farmer residing near Fleming aforesaid, and that defendant, having under consideration the construction of a residential building, requested plaintiff to tender for the supply of the lumber referred to in the 3rd paragraph of the statement of defence, to be used in connection with the erection of said building, and plaintiff in accordance with said request did make a tender for the supply of the said lumber, which was accepted by defendant, for the price or sum of $464.88, and it was part of the said agreement that the defendant was to take and obtain the said material from the plaintiff's lumber yard at Fleming aforesaid, except where the plaintiff did not have the quality or quantity of the material so to be supplied, and in which event the defendant was to obtain such material from W. H. Barton, a lumber merchant doing business at Moosomin, in the said province of Saskatchewan; the defendant, having changed the plans for the construction of the said building, found it necessary to obtain, and did obtain, material different from that originally agreed upon, and also obtained from the said W. H. Barton material which he, the plaintiff, both as to quality and quantity, was in a position to supply from his said lumber yard at Fleming aforesaid, and the defendant also obtained material from one John Hind, which both as to quality and quantity he could have obtained from the plaintiff's said lumber yard, or from the

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lumber yard of the said W. H. Barton at Moosomin aforesaid, and the defendant, in view of the aforesaid facts, treated the original contract above referred to as at an end, and, in view of the facts above alleged, the said original contract was made impossible of performance or of being carried out, and the same was thereby, at the election of the plaintiff, cancelled and at an end.

"3. The plaintiff repeats the statements contained in the preceding paragraph, and says that in arriving at the amount of the said tender, he, the plaintiff, made a mistake in the addition of figures, and that the amount of the tender should have been $805.20, instead of $464.88, and the defendant was aware of the said mistake, and could not reasonably have supposed that the plaintiff intended to supply the said material for the sum of $464.88, and the plaintiff in his said claim has charged the defendant at the rates and according to the price list from which the amount of the said tender was arrived at."

I find the following facts. The defendant purposed having a house built on his property, and prepared a list of material which he estimated would be required for the purpose, and submitted the list to a number of lumber dealers, among whom was the plaintiff, and requested them to tender therefor. The list so presented contained all the items set out in the statement of defence, and in addition contained four doors—one 2/10 x 6/10 x 1¾, which was intended for a front door; one 2/10 x 6/10 x 1¾, intended for a back door; one 2/6 x 6/6 x 1¾, intended for a dining-room door; and one 5 x 2 x 6 x 1¾, intended for a sliding-door. It also contained four windows, two of which were to be 44 x 50, and the other two 15 x 50, the first two were to have plate glass lights and the other two lead lights. It also contained one window on stair, one triplet window in gable, and material for veranda. Also 18 M. brick. When this list was handed to the plaintiff, a copy of it was made, and he proceeded upon that copy to figure up what, in his opinion, he could supply the material for, and on 4th March, 1904, he put in a tender which was as follows: "D. Osborne, Esq., Dear Sir:—My estimate for the material required for your residence, exclusive of the front, back, dining room and slide doors and the 2 plate windows 44 x 50 and 2/15 x 50, also window in stair and triplet window and veranda stuff—is $464.88. As regards the doors and windows above mentioned I will put them in as mentioned

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to you when here a few days ago. If any alteration in the specifications is required, they would be on same basis as now figured. Trusting to receive your esteemed order, I am, yours respectfully, W. H. Anderson." This tender was accepted by the defendant, and it was also verbally arranged that the defendant might, in case the plaintiff had not lumber in stock of the quality specified, obtain the same by order on Barton or Hind. It was also arranged as a condition of obtaining lumber from Hind that the defendant should endeavour to induce Hind to allow the plaintiff a commission on the price of the lumber which he supplied to the defendant. In making up this sum of $464.88 the plaintiff committed some very serious errors. The gross addition of the values which he made on the first page of this copy of list should have been $451.50, whereas he made it $151.50. On the next page in figuring on the 500 feet of 1 x 3 x 16 V. he made it $2.04, whereas it should have been $15.00. On figuring on the value of the 22 pieces of door jam, 2 x 6 x 14, he made it $7.70—it should have been $13.86. On the third page on figuring on the value of the doors that he tendered for, he made it $10.40, whereas it should have been $49.50; and all these errors were carried forward into the gross amount, so that the gross amount of his estimate was only $489.34, from which he deducted $24.46, being 5 per cent. off his estimate, leaving $464.88, the amount of his tender, whereas the gross amount of his tender ought to have been $847.50, and, with the discount of 5 per cent. off, being $48.37, it should have left a balance of $805.19, for which amount his tender ought to have been according to his prices. Tenders were put in by other lumber dealers, namely, W. R. Barton, John Hind, the Prairie Lumber Company, and S. H. Greenwood. Barton's tender was for $828.80; this tender included the four doors not tendered for by the plaintiff. The Prairie Lumber Company's tender was $852.80; this included the four doors and also the two windows not included in either Barton's or the plaintiff's tender. This tender of the Prairie Lumber Company is the only one in which the prices charged for each item were specifically set forth; (all the other tenders were in lump) and the price put upon these four doors was $32.05, and the price put upon the two windows was $36. Hind's tender was $802.30 and Greenwood's $950. I gather that none of these tenders included the bricks or the window on the stair, the triplet window in the gable, or the material for the veranda. Consequently Hind's tender was the lowest,

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and all the other tenders were lower than the plaintiff intended his to be had it not been for his mistakes, except Greenwood's.

It was urged that I ought not to have received in evidence the tenders of other persons than the plaintiff. I received the evidence subject to the objection, with the understanding that I would strike it out if I thought it was improperly received. I am of opinion, especially in view of the grounds upon which I decide this case, that this evidence was properly received. It is very difficult for me to believe that the defendant, with all these tenders before him, had not a very strong suspicion that plaintiff had made a serious mistake in his tender. The defendant appeared to be an intelligent man, and I formed too high an estimate of his intelligence to come to the conclusion that this great discrepancy, amounting nearly to one-half of what the others tendered for, did not attract him and make him suspicious. In fact, I cannot help but come to the conclusion, and find, that he was aware that a mistake had been made. He has endeavoured to explain it by stating that he thought possibly the value of the doors and the windows which the plaintiff did not tender for might make the difference. All I have to say is that that is absurd, especially in view of the fact that he had the Prairie Lumber Company's tender specifying a price for these doors and windows, and I cannot believe it.

Mr. Brown on behalf of the plaintiff applied during the progress of the plaintiff's case to amend the pleadings by striking out paragraphs 2 and 3 of the reply and adding them to the statement of claim as paragraphs 2 and 3 thereof, and by striking out of paragraph 3 the words "his said claim" and substituting therefor the words "paragraph 1 hereof." I refused this application at that stage of the proceedings, for two reasons: first, because I thought that this was incorporating a new cause of action; and second, because, if an amendment was made, I would force the defendant to enter into an agreement which he would not have entered into if the tender had been in accordance with the plaintiff's figuring. Mr. Brown renewed the application at the close of the case, and also at that stage applied to add a prayer to have the agreement rectified. Upon looking at the authorities, I am of opinion that the fact that a proposed amendment sets up a new case is not necessarily fatal to the application being granted. In Budding v. Murdoch, 1 Ch. D. 42, the Master of the Rolls said: "The case now set up by the plaintiff was

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not raised by the bill; and if the suit had come to a hearing before the recent Act, the question whether the plaintiff should be allowed to amend would have required great consideration, having regard to the decision in Lord Darnley v. London, Chatham, and Dover R. W. Co., 1 D. J. & S. 204. Under the circumstances, he thought the new practice ought to be applied, and that the plaintiff ought to have liberty to amend." In Habbuck v. Helms, 56 L. J. Ch. at p. 539, Stirling, J., says: "But it is said that I ought not to give the leave, because the amendment amounts to an entire change of the nature of the action. I think it does substantially change the nature of the action; but I think, at the same time, that it is an amendment which ought to be allowed."

As to the amendment forcing the defendant to enter into a contract which he would not have entered into, I shall be careful that no injustice is done him in this respect. I think this proposed amendment is a proper one to allow. I will not allow those paragraphs of the reply to be carried forward and form part of the statement of claim, because I am of opinion that they are in their proper place, and properly come as a replication to the statement of defence. The matter pleaded may, in the event of an appeal, turn out to be well pleaded; but I will allow the plaintiff to amend his statement of claim by setting forth the errors in the contract, the circumstances under which they arose, and adding a prayer for the rectification or annulling of the agreement. This amendment may be made as plaintiff may be advised. I was in hopes that I might see my way clear to dispose of this case and do justice between the parties without ordering this amendment, but so many difficulties have presented themselves that I have come to the conclusion that the only way I can do justice according to law, as I understand it, is by ordering this amendment. I will consider the amendment made, therefore, and proceed to dispose of the case.

In Paget v. Marshall, 54 L. J. Ch. 575, which was a case of a unilateral mistake in which a rectification of a lease was required, Bacon, V.-C., says: "I think it would be right and just, and perfectly consistent with other decisions, that the defendant should have an opportunity of choosing whether he would submit, as the plaintiff asks that he should submit, to have the lease rectified by excluding from it the first floor above No. 48—whether he will choose to take his lease with that rectification, or whether he will choose to throw

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up the thing entirely—because the object of the Court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled. Then we shall have to settle the terms on which it should be annulled."

In this case I think it would be idle to ask the defendant to consent to a rectification of the agreement, because to do so would be inserting in the tender the sum of "$805.19" instead of "$464.88;" and that would force the defendant to accept a tender higher than most of the others; but I will order the agreement to be annulled, and the basis upon which I propose to fix the liability of the defendant for the lumber supplied will, in my opinion, amount to sufficient imposition of terms to do justice between the parties. It was conceded that all the lumber tendered for by the plaintiff was supplied either by the plaintiff, Barton, or Hind. It was urged, however, on the part of the plaintiff, that the defendant had no right to obtain lumber from Hind, because he had not obtained an order for that purpose, and he had not used any reasonable effort to procure Hind to allow a commission on the lumber supplied. Both these representations are true. It was also urged that the defendant had procured from Hind lumber which the plaintiff was in a position to supply him with; this was urged especially with respect to 2,800 feet of half-inch sheeting. I am not satisfied that the plaintiff had this lumber in stock when the defendant procured it from Hind; I am inclined, however, to the opinion that he did have it. But whether or no (and this affects the objections of not obtaining the order, and not making a reasonable effort to induce Hind to allow a commission as well as the getting from Hind of lumber which the plaintiff asserted he had in stock), the plaintiff knew all along that the defendant was procuring lumber from Hind, and I believe he must have known that he had got the half-inch stuff and other lumber which he said he had in stock from Hind, and he raised no objection to it whatever. In fact, he never looked upon this conduct of the defendant as a ground for rescinding the contract, he distinctly admitted that he had no objection to offer in this respect, and that no objection would have been raised in this respect if he had not made a mistake in his tender.

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Under such circumstances he cannot be allowed to claim a rescission of the contract. I may say that this is one of the difficulties that has presented itself to my mind in coming to a conclusion, that the plaintiff could recover in this action upon the common accounts for the lumber he had actually delivered without having the written agreement rectified or annulled.

It was also contended that the plaintiff had the right to treat the contract as rescinded and recover upon the common accounts because there was an alteration in the size of the defendant's house of about 8 inches all around; this caused some joists required to be of less length than was mentioned in the specifications. This, however, was treated as of no moment, and it was readily conceded that material of the length required had been given in substitution of that mentioned in the specifications. I have reached the conclusion to allow the plaintiff the amount of the lowest tender.

The lowest tender was that of Hind;		$802 30
I will deduct from that the four doors not included in the plaintiff's tender at the valuation put upon them in the tender of the Prairie Lumber Company		32 05
leaving		770 25
and from that I will deduct the value of the four windows not included in the plaintiff's tender, the valuation of which I arrive at in the same way		36 00
That would make the plaintiff's tender for what he did tender for		734 25
from which I will deduct a discount of 5 per cent.		36 71
making a balance of		697 54
to that add the value of 110 11-14 bushels of lime supplied at 42½c.	$47 08	
and for lumber supplied the defendant not specified in his list of materials	93 92	
		141 00
making a total of		838 54

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From that credit the defendant with payments admitted in the statement of claim	$247 00, and	
paid John Hind for material supplied by him on account of the plaintiff's tender	226 71	
making		473 71

which leaves a balance of .....$364 83, for which amount the plaintiff will have judgment.

So far as the question of costs is concerned, I will follow Paget v. Marshall, already cited, and allow no costs to either party. I think this case very closely resembles that one. I will not allow the plaintiff costs because his mistakes have been the cause of the whole trouble, and, moreover, I am of opinion that the relief he claimed in his action as originally lodged was not a relief that he could obtain, and he only got on the record in a position to claim relief at the trial. I will refuse costs to the defendant, because I am of opinion that he knew that there was a mistake in the plaintiff's tender. He may not have known just where the mistake was, but he must have known there was a mistake, and I am of opinion therefore that his objection to the plaintiff's demand has been unreasonable.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 8TH, 1906.

CHAMBERS.

CANADIAN MOLINE PLOW CO. v. CLEMENT.

Money in Court—Stop Order—Application by Simple Contract Creditors—Creditor's Relief Ordinance—Attachment of Debts.

Motion by plaintiffs for a stop order.

J. T. Brown, Moosomin, for plaintiffs.

No one for defendants.

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WETMORE, J.:—The Home Investment and Savings Association brought an action against the defendants and some other persons, subsequent mortgagees and execution creditors, to foreclose their interests in mortgaged premises. The execution creditors were one Chapin, E. N. Heney & Co., and the Ashdown Hardware Company. An order for sale was made, and the mortgaged property was sold. Out of the proceeds of such sale, the claim of the Home Investment and Savings Association was paid; the sale was confirmed, and the balance of the purchase money was ordered to be paid into Court, and out of that balance after payment of a trifling amount to the Home Investment and Savings Association still due on their claim, it was ordered that the plaintiffs' costs of that action should be paid, including an allowance to Mr. Matheson, by whom the sale was conducted, and the costs of confirming the sale; and, in the next place, to be applied in payment to the Moline Plow Company, the plaintiffs in this action, of the amount found due to them under their mortgage, with their costs; and, in the next place, to the three execution creditors above mentioned, according to their respective priorities, in so far as the same would extend, together with their costs—the right of priority to be established before the clerk; and it was ordered that the balance remaining, if any, be paid out to the defendants Clement and Cooper. It has not yet been ascertained, so far as I know, that there will be any balance coming to Clement and Cooper after the other payments have been made.

The plaintiffs brought an action against these defendants Clement and Cooper, as assignees of a promissory note made by such defendants in favour of one R. Kellett, and plaintiffs now apply, and have taken out a Chambers summons, for a stop order to hold the moneys coming to the defendants out of the proceeds of the sale of the mortgaged property. The writ of summons and statement of claim with the Chambers summons were served upon the defendants, and no one appeared at the return of the Chambers summons on their behalf. No judgment has as yet been entered in this action. I can find no authority for granting a stop order before judgment is recovered except one, Steckles v. Byers, 10 C. L. T. Occ. N. 41. That case was decided by the Master in Chambers in Ontario, and had it not been for that decision it would never have occurred to me that a stop order could be

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issued before judgment was recovered, and it is worthy of note that in that case the application was based upon the fact that another creditor had execution against the defendant in the sheriff's hands, and, that being so, it was urged that all creditors would under the Creditors' Relief Act be entitled to share in the fund, and Dawson v. Moffatt, 11 O. R. 484, was cited for that purpose. The Master, however, held that a Division Court creditor was entitled to a stop order prior to judgment, because of his right to proceed to attach moneys in the hands of a garnishee immediately upon the issue of a summons. I am unable to agree with that conclusion. Dawson v. Moffatt decided two matters, namely, first, that since the coming into force of the Creditors' Relief Act, then in force in Ontario, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby, but all must share ratably in such funds; that is, they looked upon a stop order as equitable execution, and held that the execution creditors were in the same position in respect to that fund as they would be with respect to any other fund or any other property which had been seized by the sheriff under execution; and, second, they also held that, inasmuch as there were provisions in the Creditors' Relief Act, to enable simple contract creditors to come in and obtain the position of execution creditors, a simple contract creditor having complied with such provisions was entitled to share with the execution creditors in the fund. But we have no such provision in the Creditors' Relief Ordinance, C. O. ch. 26, authorizing simple contract creditors to come in and share. On the contrary, the provisions of the Creditors' Relief Ordinance are quite to the opposite effect. Section 6 provides as follows: "No creditor shall be entitled to share in the distribution of money levied from the property of a debtor unless by the delivery of a writ of execution he has established a claim against the debtor either alone or jointly with some other creditor or creditors. The provisions for attachment of debts, or (as they are more commonly called) garnishee proceedings, are entirely statutory. They do not make any provision for stopping a fund in Court, and if I were to hold in accordance with what was held by the Master in Steckle v. Byers, I think I should be legislating.

I must refuse this order.

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NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. DECEMBER 15TH. 1906.

TRIAL.

TUCKER v. ARMOUR.

Landlord and Tenant—Lease—Assignment—Non-registration Land Titles Act—Rent in Arrear—Re-entry by Landlord—Action by Assignee of Lease to Recover Possession—Parties—Original Lessee—Subletting by Assignee—Termination of Sub-lease — Fraud — Pleading — Payment of Rent — Costs.

Action for possession of land.

Ford Jones, Regina, for plaintiff.

D. J. Thom, Regina, for defendant.

NEWLANDS, J.:—Defendant on 18th October, 1904, leased the land in question to one Herbert Tucker for the term of 10 years from 23rd March, 1903, at a monthly rental of $12, which lease was duly registered in the Land Titles Office at Regina, and a memorandum thereof indorsed on defendant's certificate of title. On 10th May, 1905, Herbert Tucker assigned all his interest in the lease to William Tucker, the plaintiff, by an assignment duly executed under seal. Since then plaintiff had paid the rent to defendant by cheque up to 30th November, 1905. This assignment of lease was never registered under the Land Titles Act. In September, 1905, plaintiff sublet the premises to one Bernard Glasserman from 15th September, 1905, to 1st June, 1906, at a monthly rental of $47.50. On 6th March, 1906, there being three months' rent due to defendant by plaintiff, defendant re-entered on the premises, and now holds the same. On 9th March, 1906, plaintiff tendered to defendant all the rent due by him, which defendant refused to accept, and plaintiff brings this action to recover possession of the premises.

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It is objected on the part of defendant that plaintiff has no title to the premises, the assignment to him from the original lessee never having been registered under the Land Titles Act. Section 54 of the Land Titles Act provides: "After a certificate of title has been granted for any land, no instrument, until registered under this Act, shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or for a less period), or render such land liable as security for the payment of money; but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security, in manner and subject to the covenants, conditions, and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature."

This section is similar to sec. 59 of the Territories Real Property Act, under which Wilkie v. Jellett, 2 Terr. L. R. 133, affirmed by the Supreme Court of Canada, 26 S. C. R. 282, was decided. There it was held that, though the registered owner was the legal owner of the lands,, he was a bare trustee for an unregistered transferee, and that the Courts would give effect to the title of the equitable owner, and "no action for the recovery of land can be defeated for the want of the legal estate where the plaintiff has the title to the possession:" Jessel, M.R., in General Finance Co. v. Liberator Benefit Building Society, 10 Ch. D. at p. 24.

The next objection raised by defendant was that the proper parties were not before the Court—that the original lessee was a necessary party, and should have been a plaintiff. In Hare v. Elms, [1893] 1 Q. B. 604, it was held that the original lessee was a necessary party where judgment in ejectment had been obtained and the lease was forfeited and gone. In this case the lease has not been determined by an action of ejectment. The defendant reentered under his lease without taking any legal proceedings. In Hare v. Elms, Day, J., in delivering judgment, referred with approval to the judgment in Doe d. Wyatt v. Byron, 1 C. B. 623. In that case the Judge said: "There was no judgment in ejectment at all. The defendants, who were under-lessees of the term, less two days, appeared to the writ as soon as they heard of it, and before judgment, and asked the Judge to exercise his juris-

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diction by allowing them to pay the rent and costs into Court at once. They asked to be allowed to pay the rent and costs into Court before judgment and execution took place, and asked for a stay of proceedings upon payment of the rent and costs under 4 Geo. II. ch. 28. The Judge allowed that to be done, and under his direction the rent and costs were paid to the lessor. Everybody therefore remained in the same position as they always had been. The Judge's decision was upheld by the Court. That case, however, is no authority for the proposition that an under-lessee has a right to deal with the matter in the absence of the original lessee. The lessees there were not necessary parties at all. The lease had never been determined; there had been no judgment or entry in ejectment:" [1893] 1 Q. B. at p. 609. The original lessee is not, therefore, a necessary party to this action.

The defendant further contends that the plaintiff, having sublet to Glasserman, and that lease being in existence at the time the action was brought, had no right to bring this action. The evidence shewed that Glasserman had become insolvent and had absconded from the province, and that on 10th January, 1906, plaintiff put the sheriff in possession of the premises under a distress warrant, under which the sheriff realized and paid him his rent up to 15th March, after which the sheriff retained possession of the premises under a writ of attachment and executions against Glasserman, and after he completely sold out the goods of Glasserman on the premises, and before he released the same, defendant re-entered, demanded and received the key from him, and took possession of the premises. In the lease to Glasserman it is provided that plaintiff shall have the right of re-entry if Glasserman permitted any execution to be levied against his goods. It is contended on the part of defendant that plaintiff, having distrained, had abandoned his right to re-enter, but, as Glasserman had absconded, I do not think that this interpretation can be put on the act of plaintiff in distraining, but rather that he intended to re-enter, put an end to the lease, and at the same time collect the rent due to him. The fact that he brought an action before the expiration of his lease to Glasserman is evidence that he intended to so terminate that tenancy, and under any circumstances defendant by his re-entry ousted Glasserman and put an end to his term.

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The plaintiff in his statement of claim alleges that the defendant through fraud entered into possession of the said premises and evicted the plaintiff therefrom, and defendant contends that there being no proof of fraud on the part of the plaintiff his action should be dismissed. In support of this proposition he cites Wilde v. Gibson, 1 H. L. C. at p. 626, where Lord Cottenham, L.C., says: "That the plaintiff, having rested his case in the bill upon imputations of direct personal misrepresentation and fraud, cannot be permitted to support it upon any other ground. . . . The case alleged is not proved, and the case proved is not alleged, and if it had been would not have been sufficient to support the decree." This is not the case here, as, leaving out the allegations of fraud, there is sufficient to support plaintiff's claim, and he is entitled to recover apart from that allegation altogether.

In Howard v. Fanshawe, [1895] 2 Ch. 581, it was decided that the lessee was entitled to relief in the case of a peaceable entry by the landlord without the issue of a writ of ejectment upon payment of the rent due. Plaintiff will therefore be entitled to the possession of the demised property according to the lease mentioned in the statement of claim. He must, however, pay the rent, and defendant must thereupon deliver up possession to him. Plaintiff must bear the costs of the action, except so far as they have been increased by the defendant restricting his claim, and these costs must be borne by defendant.

There will, therefore, be a reference to the clerk to ascertain the amount of rent due to defendant.

MANITOBA.

MACDONALD, J. DECEMBER 14TH, 1906.

TRIAL.

MERILEES v. COX.

Fraudulent Conveyance — Husband and Wife — Defeating Creditors of Husband—Declaration of Trust.

Plaintiff, on 29th June, 1905, recovered a judgment in the Court of King's Bench against defendant James A. Cox for $4,946.03 and $73.07 for costs, and on 27th September, 1905, having registered a certificate of the judgment in the Land Titles Office at Carman, brought this action to enforce the judgment against the south-east quarter and the east half

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of the south-west quarter of section 7 in township 9 and range 8 west of the first principal meridian, the lands being within the Land Titles District of Carman.

J. B. Coyne and G. Moody, for plaintiff.

A. J. Andrews and H. A. Burbidge, for defendants.

MACDONALD, J.:—Plaintiff alleges that defendant James A. Cox is the owner of the lands in question, although they are registered in the name of his wife, the defendant Catherine Cox, and seeks to set aside the transfer of the lands made by the Landed Banking and Loan Company to defendant Catherine Cox, on the ground that the defendant James A. Cox voluntarily conveyed the lands, or procured them to be voluntarily conveyed, to his co-defendant, while he was in insolvent circumstances, for the purpose of hindering, defrauding, and delaying his creditors, and to have it declared that he is the owner of the lands, and that the same are bound by the certificate of judgment.

The defendants came to this province from Ontario in 1895, without any means, and settled in Treherne. The wife, as she alleges, took in one or two boarders, on the understanding between herself and husband that any moneys earned by her through such boarders were to be her own. The husband, wife, and family all lived together. The husband worked in a mill at a salary of $7.50 per week and assisted in the support of the family, and no books were kept separating the money made through the keep of the boarders.

For three years they lived in Treherne, during which time they saved $150, which money was applied as a first payment on the purchase of the farm in question in this action. The wife asserts that the $150 was hers, that she saved this out of the earnings got from the boarders. She no doubt contributed towards this saving, but the husband did so also, and I must find that the $150 was the property of the husband, and that the farm being purchased with this $150 as the original instalment of purchase price, I must hold that the wife was and is a trustee for the husband, and that the certificate of judgment binds the lands and forms a lien or charge upon them, and, as I am bound to infer that the intent was to hinder and delay the creditors, and both husband and wife assert the reality of the transfer, plaintiff is entitled to judgment with costs, and to the usual provisions for sale of the lands in the pleadings described.

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MACDONALD, J. DECEMBER 20TH, 1906.

SINGLE COURT.

PATTON v. PIONEER NAVIGATION AND SAND CO.

Interim Injunction—Injury to Property by Taking Sand from River—Convenience of Public—Private Rights—Prima Facie Case.

Motion for a continuation of an interlocutory injunction restraining defendants from taking sand out of the Assiniboine river opposite the property of plaintiff.

J. A. M. Aikins, K.C., and H. P. Blackwood, for plaintiff.

J. H. Leech and J. E. O'Connor, for defendants.

MACDONALD, J.:—On behalf of plaintiff affidavits are filed, alleging that the taking away of the sand is causing a subsidence, and, if allowed to continue, that it is but a question of time when a large portion of the banks will fall into the river, causing irreparable damage to the lands of plaintiff.

A number of affidavits are filed on behalf of defendants shewing the value to the public from the use of this river sand and the loss to contractors and the public, by being unable to secure it.

Inconvenience to the public cannot be set up as against private parties.

An affidavit is also filed made by Robert Hall, president and general manager of defendants, in which he swears that the subsidence is caused otherwise than by the dredging operations of defendants. Stress is laid upon the fact that this is a positive averment, and not opinion evidence, and that it should be accepted as conclusive. I cannot give any greater weight to this than the opinion evidence before me, for I cannot understand Mr. Hall's affidavit to be other than a matter of opinion and belief.

From a perusal of the material, I find that there is a fair prima facie case made out which entitles plaintiff to a continuance of the injunction.

Plaintiff is to be at liberty to add Robert Hall as a co-defendant, without prejudice to the injunction.

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MANITOBA.

OCTOBER 11TH, 1906.

COURT OF APPEAL.

WILLIAMS v. HAMMOND.

Master and Servant—Contract of Hiring—Wrongful Dismissal—Justification — Incompetence — Misconduct—Disrespectful Language—Provocation.

Appeal by defendant from decision of PERDUE, J., 4 W. L. R. 208.

A. E. Hoskin, for defendant.

A. Haggart, K.C., and H. W. Whitla, for plaintiff, were not called on.

The judgment of the Court (HOWELL, C.J.A., RICHARDS and PHIPPEN, J.J.A.), was delivered by

RICHARDS, J.A.:—I do not see any ground for interfering with the findings of the trial Judge. It seems to me that the plaintiff's alleged insolence was provoked by defendant's conduct, and did not justify the dismissal. The ground of alleged incompetence was not that on which defendant acted in dismissing plaintiff. That fact, combined with the evidence (which I think not conclusive), makes me feel unwilling to interfere with the finding of the trial Judge, that plaintiff has not been shewn to be incompetent. I do not think the contract bears out the contention that defendant was to be the sole judge of plaintiff's competency. I think the appeal should be dismissed with costs.

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DECEMBER 5TH, 1906.

COURT OF APPEAL.

FRASER v. CANADIAN PACIFIC R. W. CO.

Discovery—Examination of Officer of Defendant Company—Information not in Personal Knowledge of Officer—Memorandum Prepared by Others—Refusal to Vouch for Accuracy—Duty of Officer to Investigate for himself.

Appeal by defendants from decision of MATHERS, J., 4 W. L. R. 525.

J. A. M. Aikins, K.C., and H. P. Blackwood, for defendants.

W. R. Mulock, K.C., and C. P. Wilson, for plaintiff.

THE COURT stopped counsel for defendants in reply, and on an undertaking to produce, for the inspection of plaintiff's solicitor, such of the papers on file as refer to the matters in question, the Court allowed the appeal and set aside the order of Mathers, J., and reinstated the order of the Referee. The costs of the appeal and of the appeal to Mathers, J., to be costs in the cause. The documents to be produced were all documents, other than privileged ones, on which the memorandum prepared by Bond and referred to by Mr. Whyte or some part of it was founded.

MANITOBA.

MACDONALD, J. DECEMBER 14TH, 1906.

TRIAL.

CARRUTHERS v. FISCHER.

Principal and Agent—Agent's Commission on Sale of Land—Sale Made but afterwards Rescinded.

Action for commission on sale of land.

T. M. Daly, K.C., and W. M. Crichton, for plaintiffs.

J. Graham, for defendant..

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MACDONALD, J.:—Defendant was the owner of lots 88, 89, 90, and 92 of the parish of St. Francois Xavier, consisting of 1022.80 acres, and in March, 1903, placed the same for sale in the hands of the plaintiffs, who are real estate agents, at the price of $10 per acre.

Subsequently, by agreement between the parties, the price of the land was raised to $11 per acre, and the commission to which the plaintiffs were to be entitled in the event of a sale was fixed at $1.50 per acre.

Plaintiffs secured a prospective purchaser in the person of William Hopkins at $11 per acre, but before completing a bargain Hopkins desired to see the land, and it was arranged that R. W. Gardiner, an employee of the plaintiffs, Hopkins, and the defendant should go and see the land. Neither Hopkins nor Gardiner had ever seen the land; the defendant had some years previously been in the north end of it.

Arriving at what was believed by defendant to be the land, and relying on his representation that the land shewn him was the land in question, Hopkins agreed to buy at $11 per acre.

Plaintiffs contend that they then became entitled to their commission on the sale, and there is no doubt they would be so entitled, notwithstanding the scheme of the defendant to deprive them of it, if not disentitled in the light of subsequent events.

The land shewn to Hopkins was not lots 88 to 92, but land of a much superior quality, and upon making this discovery Hopkins repudiated the contract, and the same was rescinded by a judgment of this Court, and the moneys paid by Hopkins to defendant were refunded.

Notwithstanding these facts, the plaintiffs claim the amount of the commission agreed upon, as they contend that they did all that they were called upon and that was possible for them to do.

The representation made by defendant was honestly made in the belief that the land shewn by him to Hopkins was the land he was selling him. The transaction was free from fraud.

Why did the defendant Gardiner and Hopkins go out to see the farm? It surely must have been to ascertain if the land was suitable for the purpose for which Hopkins wanted

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it, and the sale was conditional upon the land inspected being the land under treaty between the parties.

The plaintiffs knew that Hopkins must be satisfied with the land after an inspection of it, and if he was not satisfied there would be no sale and therefore no commission.

When the mistake was discovered, and Hopkins saw the land described in his agreement, he was not satisfied, and there was no sale, and in consequence plaintiffs are not entitled to succeed.

The action is dismissed with costs.

Defendant counterclaims against plaintiffs for $100 paid to R. W. Gardiner, which he admits was for what he considered the value of the services rendered by Gardiner.

I dismiss this claim without costs.

MANITOBA.

MACDONALD, J. DECEMBER 20TH, 1906.

CHAMBERS.

WICHER v. CANADIAN PACIFIC R. W. CO.

Railway—Expropriation of Land—Deposit of Plan—Failure to Take Proceedings to Compensate Owner—Remedy of Owner—Action for Trespass—Stay of Proceedings—Undertaking to Proceed to Settle Compensation.

Motion by defendants to set aside the statement of claim, on the ground that it disclosed no cause of action, and that plaintiff's only remedy was by arbitration.

H. P. Blackwood, for defendants.

Elliott and MacNeil, for plaintiff.

MACDONALD, J.:—The statement of claim alleges that plaintiff is the owner of certain lands in the city of Winnipeg, and that defendants in the month of July, 1903, by their servants, agents, and workmen, wrongfully and unlawfully entered upon the lands and, amongst other things, removed, pulled up, and destroyed the boundary stakes, and constructed, built, and laid down a large portion of their

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line of railway along, across, and upon the lands, without any notice to or the permission of plaintiff.

It is urged on behalf of defendants that they entered upon and took the land in question pursuant to the powers vested in them by the Canadian Railway Act, having first made and deposited, in compliance with that Act, a plan, profile, and book of reference, and that, having thus complied with the Act, the only remedy of plaintiff is that provided for by the Act, namely, arbitration.

The defendants must, however, do more than prepare and deposit a plan, profile, and book of reference; they must take the necessary proceedings to compensate the owner of land so entered upon and taken by it, as provided for by the Act, and, failing to do so, they are trespassers, and plaintiff is not limited to the remedy provided by the Act.

The motion is dismissed with costs.

Upon the defendants undertaking to proceed within 30 days to settle the compensation due to plaintiff under the provisions of the Railway Act, I grant a stay of proceedings in this action.

MANITOBA.

DECEMBER 21ST, 1906.

COURT OF APPEAL.

MALCOLM v. McNICHOL.

Negligence—Damage to Goods of Tenant on Demised Premises—Escape of Steam—Work Done by Order of Agent of Landlord—Authority of Agent—Employment of Independent Contractors—Liability of Contractors for Work—Damages.

Appeal by defendants from judgment of DUBUC, C.J.M., 2 W. L. R. 515.

J. A. M. Aikins, K.C., and J. B. Coyne, for defendant McNichol.

C. P. Wilson and A. C. Ferguson, for defendants the Standard Plumbing Co.

A. B. Hudson and H. Ormond, for plaintiff.

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The judgment of the Court (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—The plaintiff leased from the defendant McNichol a store in the Stobart block in Portage avenue, Winnipeg, in July, 1904, for the purpose of carrying on a millinery business. One of the terms of the lease was that McNchol should heat the store properly, during the months from October to April inclusive, the plaintiff to pay $15 a month extra during these months to cover the heating.

In December, 1904, plaintiff complained to Pepler, McNichol's collecting agent, that the store was not heated sufficiently. In the summer of 1904 a contract had been let by McNichol to the other defendants, the Standard Plumbing Co., to install a heating plant, which would be sufficient to heat the building to a certain named temperature during cold weather. This work had been done under the supervision of McNichol's architect. Pepler notified the plumbing company that the plant installed did not comply with the agreement. He also brought the matter to the attention of the architect, and the latter called upon the company to place an additional radiator in plaintiff's store, so as to fulfil the conditions of their contract. At this time the work had not been definitely accepted by the architect or a final certificate given.

After some objections were made by the plumbing company, they agreed to put in an additional radiator as requested. In order to do this it was necessary to cut the steam off from the pipes leading from the furnace. On 28th December the plumbers' man shut off the steam at the boiler, and then proceeded with the work of putting in the additional radiator. When the usual hour for ceasing work arrived on that day, the work had not been completed. The plumbers, accordingly, put a valve on the upper end of the steam pipe which would connect with the radiator, and closed the valve in order that steam might be turned on during the night to heat the premises of other tenants. This valve was closed or opened by turning a knob, and was a part of the apparatus which would remain in use when the work was completed.

The plumbing company's man, Fiddler, who was in charge of the work, then went to the basement and turned on the steam. This was done for the benefit of other tenants in the same building, who had been deprived of heat by reason of the shutting off of the steam. Soon after the steam was

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turned on, water was seen coming through the ceiling from the room above and dripping on plaintiff's goods. She at once called the attention of the caretaker and Fiddler to this. It was found that the room overhead, which was rented by another tenant, was locked, and the caretaker could not get in to see what had gone wrong. The plumber then again shut off the steam at the boiler, and the flow of water ceased. Plaintiff and her sister soon after this locked the store for the night and went away, Fiddler going out of the store at the same time.

The caretaker had arranged with Fiddler to come back in the evening and repair the break, when the room upstairs could be opened. The caretaker succeeded in getting into the room where the break was. He found that a steam cock had been broken off the radiator and had been stopped with a piece of wood which had blown out when the steam was turned on, after being shut off during the day. He closed the valve in the pipe leading to the broken radiator. This would prevent any further flow of water from the break, when steam should be turned on.

Fiddler then, with the assistance of the caretaker, again turned on the steam. Plaintiff's store was locked, and there does not appear to have been any effort made to get into it to see if everything was right when the steam was turned on the second time. There is evidence that Fiddler told plaintiff after the steam had been turned off in the evening, that it would have to remain off until the morning, and that there was no need for her to come back that night, although she offered to do so.

On opening the store on the following morning, it was found that the valve on the end of the pipe had been left open, allowing the steam to escape into the store and to greatly injure plaintiff's goods.

It seems clear that the valve upon the pipe was closed when the steam was first turned on in the evening of 28th December. If it had been open, the escape of the steam would have been detected at once. It is clear that the valve was opened after the steam was shut off at the boiler, when the leakage of water was discovered. It is impossible from the evidence to say who opened it. I do not, however, think it necessary for the decision of this case that there should be any express finding upon that point.

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The defendant McNichol disputes his liability upon the ground that he did not authorize the work that was being done when the damage took place. I think the trial Judge was justified in finding that Pepler had authority, on behalf of his principal, to direct the work to be done. He and the architect simply called upon the plumbing company to make good a deficiency in the work done under the heating contract entered into between them and McNichol. McNichol was bound under the terms of the tenancy to heat the premises, and the plumbers were bound under their contract to make the heating apparatus sufficient for that purpose. When the plumbers failed in any respect as to the sufficiency of the heating plant supplied, either the architect or Pepler, in the absence of McNichol himself, was justified in calling upon them to remedy the defects as soon as they were discovered. It must, therefore, be held that the work in connection with the radiator in plaintiff's store was done with the authority of McNichol.

In order to do the work it was necessary to cut off the steam at the boiler. This was done with the implied consent of McNichol. It was then the duty of the plumbers to go on with the work of putting in the additional radiator. When that work should be completed they would be under no obligation to turn on the steam again. That would be a matter to be attended to by the owner of the premises or those acting for him. When it was time for the plumbers to cease work for the day, they stopped the pipe they had connected with the main steam pipes, by putting on a valve and closing it. This was done for the benefit of the owner and his tenants, other than the plaintiff, so that the other tenants might be supplied with the heat the owner had undertaken to furnish. As between plaintiff and McNichol, he and his employees were bound to ascertain that the heating apparatus was fit to receive the steam before turning it on. It appears to me that it was the duty of the person in charge of the heating to make sure that the valve was closed in plaintiff's store before it was turned on the second time, on the evening of 28th December. He should, under the circumstances, have obtained access to the store and have seen that everything was right before the steam was let into the pipes. The acts of the plumber, Fiddler, in turning on and turning off the steam and again turning it on must be regarded as those of the caretaker, who was present assenting to and assisting in the perform-

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ance of them, and who was in charge of the apparatus. Fiddler in fact appears to have returned in the evening at the request of the caretaker, in order to assist him in getting the steam on.

It appears to me that the caretaker in turning on the steam in the evening after plaintiff had left, without first ascertaining whether the valve was closed, was guilty of negligence for which his employer was responsible, the act having been performed while the caretaker was discharging the duties of his employment.

The Standard Plumbing Company cannot be bound by, or held responsible for, the actions of their employee, Fiddler, in turning on the steam in the evening, as he was in so doing clearly acting outside the scope of his employment.

The appeal of the Standard Plumbing Company should be allowed and the action dismissed as against them. They should be allowed their costs of the appeal as against plaintiff, but, as there was some grounds for making them parties to the action in the first place, there should be no costs to them in the Court below. The appeal of defendant McNichol should be dismissed with costs, and the judgment of the Court below should stand as against him, except that no damages should be allowed for injury caused by the leakage of water from the room above.

MANITOBA.

MATHERS, J. DECEMBER 22ND, 1906.

CHAMBERS.

RE MILLER AND TOWN OF VIRDEN.

Municipal Corporations—By-law Establishing Public Weigh-Scales and Regulating Sale and Weighing of Coal—Powers of Town Corporation—Municipal Act—Restraint of Trade—Monopoly.

Motion by one Miller to quash by-law No. 302 of the town of Virden, being a "by-law to establish and regulate public weigh-scales and to regulate the sale and weighing of coal."

J. Agnew, for applicant.

I. Campbell, K.C., for the town corporation.

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MATHERS, J.:—Particular objection is taken to sec. 5 of the by-law, which is as follows:—

"5. All coal sold by weight within the town of Virden for delivery to any point within the town of Virden shall be, before delivery, weighed upon the public weigh-scales, and the party delivering such coal shall, at the time of delivery thereof, hand to the purchaser thereof a certificate of its true weight, signed by the public weigh-master as aforesaid."

Section 1 of the by-law provides that the weigh-scales owned by the town of Virden and situate on lots 12 and 13 in block 101 shall be public weigh-scales, and sec. 2 provides that the council shall, from time to time, by by-law appoint an official to be known as the public weigh-master, and prescribes his duties.

The objections urged by the applicant are: (1) that the by-law is ultra vires; (2) that it is in restraint of trade; and (3) that it tends to establish a monopoly in the weighing of coal.

It is pointed out in support of the first objection that sec. 632 of the Municipal Act, sub-sec. (i), provides that the council may pass a by-law "for the purchase of, and the establishing and regulating of, public weigh-scales and necessary conveniences for weighing cattle, hay, and other articles," but says nothing about coal, and, therefore, it is ultra vires of the council to establish a public scale to weigh coal. Whatever force there might be in this contention, if the object of the by-law were to establish a weigh-scale for the purpose of weighing coal only—as to which I intimate no opinion, one way or the other—it is clearly within the competence of the council to establish and regulate a public weigh-scale; and it could hardly be held that having a public weigh-scale, lawfully established, for the purpose of weighing other commodities, it would be illegal for the council to provide that coal shall also be weighed upon it, if the council has the power to provide that coal shall be weighed at all. I do not think, however, that the authority of the council to pass the by-law in question depends upon the interpretation of this particular section. Section 654 of the Municipal Act, sub-sec. (f), provides that the council may pass by-laws: "(f) For regulating the mode of measuring or weighing, as the case may be, of lime, shingles, lath, cordwood, coal, or other fuel, and

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for imposing a reasonable fee therefor, and for regulating the sale of said articles." If the by-law depended for its support on the first part of this sub-section, I should have considerable doubt as to its validity. It seems to me that a power to regulate the "mode of" weighing coal would not empower the council to pass a by-law providing that coal must be weighed upon public weigh-scales. This part of the sub-section was copied from the corresponding sub-section in the Ontario Municipal Act, but the draftsman overlooked the fact that, in the preceding year, the Ontario legislature had stricken out the words "mode of," and in this way, in my opinion, considerably enlarged the scope of the sub-section. The concluding part of the sub-section, however, provides that the council may regulate the sale of coal, and it seems to me that, under such power, the council may provide as one of the regulations that coal must be weighed by a public weighmaster. It is laid down in Dillon on Municipal Corporations, sec. 390, that "laws requiring articles to be inspected and weighed or measured before being sold are in the nature of police regulations, and are valid, in the absence of special constitutional provisions." The law is stated in similar terms in Cooley's Constitutional Limitations, p. 286. In Tiedeman on Municipal Corporations, sec. 127, it is said that enactments providing for the weighing of coal and other articles of great bulk on public scales have uniformly been held to be lawful regulations. I am of opinion, therefore, that under a provision giving the council power to regulate the sale of coal they might properly enact sub-sec. 5 of this by-law, providing that coal should be weighed upon public scales. It seems to me, also, that under this provision of the statute the council would have the right to provide the necessary facilities for carrying such a provision into effect.

It is further objected that this provision of the by-law is in restraint of trade. In Dillon on Municipal Corporations, sec. 390, it is stated that when regulations such as those provided for in this by-law are reasonable in their nature they are not regarded as being in restraint of trade, and in Stokes v. New York, 14 Wend. 87, the Court said: "The appointment of weighers and the law requiring coal to be weighed by them is not a restraint upon trade, but a regulation of it, neither can it be said to be unreasonable." I think, therefore, that this objection must also fail.

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It is further objected that the by-law creates a monopoly in the weighing of coal, contrary to the provisions of sec. 368 of the Municipal Act. The by-law is not, however, to my mind a contravention of this section. It is not exercising a trade or calling, but is part of the machinery for the administration of the public affairs of the town of Virden, and as such is neither within the language nor the spirit of the section referred to.

In my opinion, the application fails and must be dismissed with costs.

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MATHERS, J. DECEMBER 22ND, 1906.

TRIAL.

FRASER v. DOUGLAS.

Guarantee—Payment by Guarantor of Debt of Principal—Action to Recover Amount Paid from Principal—Legal Obligation to Pay—Request of Principal—Acceptance by Creditor of Offer to Guarantee.

In 1895 plaintiff was the western agent of L. Gnaedinger Sons & Co., fur dealers of Montreal, and defendant was a fur dealer in the city of Winnipeg. In the spring of that year one McLennan, plaintiff's traveller, obtained from defendant an order for furs to the amount of $1,150.90, which plaintiff on or about 1st May forwarded to his principals. On 7th May, 1895, Gnaedinger Sons & Co. wrote to plaintiff as follows: "From what information we can gather we would not care to open a credit account with Douglas of Winnipeg, unless you think it would pay you to guarantee the account for your 10 per cent. We will await your reply before writing to him." No reply was sent by plaintiff to this letter, and on 4th June Gnaedinger Sons & Co. wrote to plaintiff again, saying: "You have not yet answered re order for B. . . and Douglas of Winnipeg. These we will not execute unless secured, and thought you might wish to save your commission by securing them. If not we wish to advise them now." On 6th July plaintiff replied to the effect that

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if they would allow 5 per cent. additional for the guarantee of the accounts he would consider it. On 9th July Gnaedinger Sons & Co. wrote that they would allow 2 1-2 per cent. for the guarantee. On 23rd July plaintiff wrote to them saying, "We will guarantee the Douglas bill to the extent of $1,200 for this season only."

In due course after the receipt of this letter Gnaedinger Sons & Co. shipped the goods to, and the same were received by, defendant and placed in his stock. No notice of having done so was sent by Gnaedinger Sons & Co. to plaintiff until 27th November following, when they wrote as follows: "We omitted informing you of the fact that we shipped goods to Douglas on the strength of your guarantee as per your letter of 23rd July."

In the meantime on 5th November, defendant had been sued by another creditor upon an overdue note for $800, and in December he made a general assignment for the benefit of his creditors and left the province of Manitoba.

On 1st October preceding Gnaedinger Sons & Co. had obtained from defendant his promissory note for $1,150.90 at 4 months. When this note fell due it was dishonoured, and plaintiff was called upon by Gnaedinger Sons & Co. for payment. To take it up plaintiff gave his own notes for $1,087.86 and $117.50 respectively at 5 and 4 months, and he afterwards paid these last mentioned notes when they fell due.

This action was begun on 18th November, 1901, to recover from defendant the money so paid by plaintiff, together with interest from 2nd February, 1896, that being the date of payment, as money paid by the plaintiff for defendant at his request.

T. M. Daly, K.C., and W. M. Crichton, for plaintiff.

I. Pitblado and D. W. McKerchar, for defendant.

MATHERS, J.:—There was some conflict of evidence as to whether or not plaintiff's guarantee was given at defendant's request. At the trial I intimated that I should without hesitation hold upon the evidence that defendant did request plaintiff to guarantee the account, and upon consideration I adhere to that view.

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It was urged on behalf of defendant that plaintiff's letter of 23rd July above quoted was but an offer to guarantee defendant's account which required notice of acceptance within a reasonable time, and that the notice sent on 27th November, after the defendant had got into financial difficulties, was too late; that plaintiff was not, therefore, bound as guarantor and could not have been compelled to pay the claim, and that in doing so he was a mere volunteer.

It may be stated as a general proposition, that a person who offers to guarantee an account must be notified that his offer has been accepted, before liability can attach to him. This is but the application of the ordinary law of contract to guarantees, namely, that there must be a consensus ad idem. If there was not such a consensus in this case, there was no contract, and plaintiff was not legally bound to pay the account which he did pay. And if he were not legally bound to pay Gnaedinger Sons & Co., I think Sleigh v. Sleigh, 5 Ex. 574, makes it clear that he cannot now recover from defendant. In that case the plaintiff drew and indorsed a bill of exchange for the accommodation of the defendant who negotiated it. When due it was not paid by the defendant, and no notice of dishonour was given the plaintiff. Notwithstanding that the plaintiff was released from legal liability upon the bill by reason of the holder's failure to give him notice of dishonour, he paid part of the amount for which the bill was drawn, to the holder, and then sued the defendant in attempt to recover the amount so paid as money paid to the defendant's use. In delivering the judgment of the Exchequer Chamber, Parke, J., said: "Where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay for want of notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the 'implied authority of the defendant;'" and a nonsuit was entered.

This brings me to a consideration of the other branch of the argument advanced by defendant's counsel, namely, was there a binding contract of guarantee in this case? In all the cases cited by Mr. Pitblado the offer to give a guarantee emanated from the guarantor, and the creditor to whom the offer was made acted upon it without notifying the proposed guarantor that he was doing so. In this case, however, the facts are vastly different. Here the proposition emanated from Gnaedinger Sons & Co., who notified plaintiff that they

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refused to fill the order of defendant unless the plaintiff guaranteed payment. Their letters amount to a proposal to fill the order if plaintiff would guarantee payment for 2 1-2 per cent. in addition to his ordinary commission. This offer plaintiff accepted by his letter of 23rd July. This offer and acceptance constituted, in my opinion, a binding contract between Gnaedinger Sons & Co. and plaintiff, and no further notice to plaintiff was necessary. In Brandt on Suretyship, sec. 213, the law is thus laid down: "Where the guaranty is given in response to a request for it by the creditor, no notice of acceptance is necessary, for the answer of the guarantor to the request sufficiently shews that he knew he had assumed responsibility." See also Nelson v. Shreve, 68 S. W. R. 376. I think, therefore, that plaintiff did not pay as a volunteer, but that he was legally bound to do so.

But, if notice that the goods were shipped pursuant to plaintiff's guarantee before defendant got into difficulties was necessary, I find that plaintiff had such notice. He had been told in the most positive terms that the goods would not be shipped without his guarantee. McLennan was frequently in defendant's store, and he says that before 1st November he saw there the goods that defendant had ordered from him, and talked about them with defendant, who expressed himself as perfectly satisfied with them. There is no doubt the goods were received by defendant before 1st October, because on that day he gave his note in payment. Notice to McLennan would be notice to plaintiff.

It was further argued that the goods were not sold pursuant to the terms of the guarantee, because a note at 4 months from 1st October was accepted from defendant, whereas the guarantee was limited to "this season only." Plaintiff knew exactly on what terms the goods were sold. McLennan says the terms were 4 months or 5 per cent. off 30 days, and it must be presumed that plaintiff guaranteed the account payable on the terms which he as Gnaedinger Sons & Co.'s agent had agreed to.

The further point that McLennan should have been a party plaintiff I disposed of at the trial, by holding that he was not a necessary party.

There will be judgment for plaintiff for $1,168.10 and interest from 2nd February, 1896, at 6 per cent.

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BRITISH COLUMBIA.

(GRAND FORKS.)

CLEMENT, CO. C.J. NOVEMBER 9TH, 1906.

ARBITRATION.

RE VARESICK AND BRITISH COLUMBIA COPPER CO.

Master and Servant — Injury to Servant and Consequent Death—Workmen's Compensation Act — Application by Parents for Compensation — Arbitration — "Dependents" Jurisdiction of County Court.

Application on the part of aliens, resident in Austria, for compensation from the respondents under the Workmen's Compensation Act, 1902.

George Varesick, a son of the applicants, was on 4th December, 1905, employed at the respondents' smelter, assisting in dumping hot slag, and on that day met his death from injuries received through a motor car conveying the slag pot accidentally running over the dump.

CLEMENT, CO. J., was appointed arbitrator, and the arbitration took place in Greenwood on 9th November, 1906.

The employment, death, etc., were admitted, but the respondents denied that the applicants were "dependents," within the meaning of the Act; contended that compensation is only payable to "dependents" who are, by the laws of the province, under legal obligation for support; and further that the Act should not be construed as extending its benefits to persons without the jurisdiction of the County Court.

O'Shea, for applicants.

Hallett, for respondents.

CLEMENT, CO. J.:—In this case the applicants, father and mother of the deceased workman, are aliens, resident now, and at the time of their son's death, in Austria; and it is urged by the respondents that the Workmen's Compensation Act, 1902, ought not to be construed as extending its benefits to them.

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Reference was made to sec. 8 of the second schedule, which makes provision for recording an award in the "County Court for the district in which any person entitled to such compensation resides," with a view to its enforcement as a County Court judgment; and it would appear that any award I might make in favour of these applicants could not be directly enforced in the manner contemplated by the Act, except, indeed, in the remote contingency that the applicants, or one of them, might even yet come to reside in this province. At first blush I was inclined to the opinion that this was the only clue afforded to the legislature's intention in regard to the area within which—so far as beneficiaries are concerned—the Act should have operation; and that the well-established presumption against such a construction of a British statute as would make it affect, either prejudicially or beneficially, persons other than British subjects or inhabitants of the British Isles: see Jefferys v. Boosey, 4 H. L. C. 815, 24 L. J. Ex. 81; Cope v. Doherty, 2 De G. & J. 614, 27 L. J. Ch. 600: The Wild Ranger, 32 L. J. Adm. 49; would operate to forbid such a construction of the Workmen's Compensation Act as would extend its benefits to "dependents" resident without the province. Further consideration, however, has led me to a different conclusion.

The basic idea of the Act is accident insurance for the workman: see judgment of Lord Macnaghten in Fenton v. Thorley & Co., 72 L. J. K. B. 787; and, as one would naturally expect, the insurance money, so to speak, is to go, in the event of death, to those in whose favour the workman would be likely to take out an ordinary policy, namely, to those dependent upon his earnings. To confine such "dependents" within geographical boundaries, or boundaries of any sort, would seem absurd on the face of it. How the difficulty above pointed out as arising under sec. 8 of the second schedule is to be surmounted is a matter for subsequent consideration. Its existence is not, in my opinion, sufficient reason for so construing this statute as to turn its clearly intended benefit in many cases into "dead sea fruit." There is no decision, so far as I am aware, upon this point under the statute—see, however, Rex v. Owen, 71 J. L. K. B. 770—but Lord Campbell's Act, which is in some respects in pari materia with

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the Act now under consideration, has been held to enure to the benefit of the widow and children, all resident in Norway, of a Norwegian whose death was caused by the negligence of a British subject upon the high seas; Davidsson v. Hill, 70 L. J. K. B. 788. Given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, that statute, in the opinion of the Court, clearly intended, in the case of death, to make the wrongdoer liable in damages to all those, no matter of what race or residence, who stood to the deceased in any one of the relationships mentioned in the Act. The principle of this decision governs the present case.

All this, however, is obiter, as the applicants have, in my opinion, failed to prove their dependence in fact. The facts are that the son left his father's home in Austria several years ago; that he did at irregular intervals send money to his parents, the applicants, amounting altogether to perhaps $400 in 6 years; that the only remittance within a year before his death was of a sum to pay the passage to America of a younger brother; that the father is the owner of a small plot of ground of (say) 5 acres, unincumbered so far as appears; that he works with this another plot of about the same size "on shares," the whole (say 10 acres) being an olive orchard; that the family at home consists of father, mother, adult brother, and a hired boy of 19; and that in some years the crops are good, while in other years it is hard work to make both ends meet. Whether or not the father, a man of 65 or 66, has any savings put by does not clearly appear; in fact, the evidence as to the condition of affairs "at home" was not at all satisfactory to my mind, although, perhaps, this may have been due to the failure of the deceased's brother, who gave evidence through an interpreter, to make himself clearly understood. But, making, and, I confess, wishing to make, every allowance possible upon this score, I find myself unable to say affirmatively that the applicants were at the time of the son's death in fact dependent for their maintenance in a manner befitting their station in life upon the earnings of the deceased. No doubt they did derive benefit from his earnings to the extent I have indicated, and it may well be that they would still further have benefited had their son lived, but these considerations do not necessarily predicate dependency: see judgment of Lord

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Shand in Main Colliery Co. v. Davies [1900] A. C. 358, 69 L. J. Q. B. 755, at p. 757; Simmons v. White Brothers, 68 L. J. Q. B. 507.

If they insist upon it, the respondents are entitled to their costs.

NORTH-WEST PROVINCES.

(SOUTHERN ALBERTA.)

SCOTT, J. DECEMBER 6TH, 1906.

TRIAL.

CAMPBELL v. CAMPBELL.

Will—Action to Set aside—Testamentary Capacity—Intoxication—Evidence.

Action for a declaration that a certain document was not the last will and testament of Colin N. Campbell, deceased, and to establish an earlier will.

W. L. Walsh, K.C., and W. M. Campbell, for plaintiff.

E. P. McNeill and C. F. Harris, for defendants.

SCOTT, J.:—Colin N. Campbell, the husband of plaintiff, died on 14th February, 1906, without issue. On 24th June, 1897, he made a will whereby he devised and bequeathed all his real and personal estate to plaintiff absolutely, and appointed her his executrix. On 12th May, 1905, he signed a paper writing purporting to be his last will and testament, whereby he revoked all former wills made by him, and, with the exception of the specific bequest of his watch and chain, devised and bequeathed all the rest and residue of his real and personal estate to his brothers, the defendants, as trustees and executors, upon the following trusts, viz.: first, during the lifetime of his wife to pay her such sums as they should from time to time in their discretion deem sufficient and ample for her comfortable support and maintenance, having in mind her separate property and means, and for that purpose they were empowered to use such por-

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tions of the corpus of the estate, in addition to the income, as they might consider necessary and prudent; second, upon the death of his wife to give the residue of the estate to his sister Flora Isabella for her own use, and, third, in the event of his sister Flora Isabella predeceasing his wife, then, upon the death of the latter, to give the residue of the estate to his nephew Ian Colin Campbell, a son of the defendant John J. Campbell, and in the further event of his earlier death, then to divide the remainder of the trust estate between themselves for their own use. The trustees were also empowered, during the lifetime of plaintiff, in their discretion from time to time, if they should be of the opinion that the estate would remain sufficient for the wife's maintenance, of which they should be the sole judges, to advance from the principal or income of the estate such sums as they should desire and deem necessary and prudent for the support and maintenance of the sister Flora Isabella.

Plaintiff charges that the deceased on 12th May, 1905, the date of the last mentioned document, was of unsound mind and did not possess the testamentary capacity sufficient to entitle him to make such a will, and that such document was so signed by him at a time when, owing to his mental condition, induced and brought about by the excessive use of intoxicating liquors for a lengthened period, he was utterly unfit and incapable of understanding or being able to transact business of any kind whatever or to make a valid testamentary disposition of his estate.

Plaintiff claims a declaration that the document of 12th May, 1905, was executed by the deceased at a time when he was not of sound and disposing mind, and that the same is invalid as a will, also a declaration that the will of 24th June, 1897, is the last will and testament of the deceased, and that the plaintiff, as the executrix named therein, is entitled to probate thereof.

Some time early in 1905 the deceased instructed Mr. McNeill, a solicitor, to prepare a will for him, and stated to him the details of the disposition he desired to make of his estate, the instructions he then gave being for a will substantially the same as the provisions of the will in question, except the last provision thereof. On a subsequent occasion, between that and 12th May, he asked Mr. McNeill if the will had been prepared, and was informed that it

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had not. On 12th May he called at Mr. McNeill's house between 11 and 12 o'clock a.m., and asked him to draw up the will that day, stating that he was leaving for Winnipeg that evening. Mr. McNeill states that they went over the terms of the will at that time as on the former occasion, and upon his asking deceased what disposition he desired to make of his estate in case his nephew died before he became entitled, he replied that the contingency was not likely to happen, but that, if it did, his brothers should divide the estate between themselves. Mr. McNeill prepared the will that afternoon, and took it over to deceased that evening about 6 or 7 o'clock. The latter read over the will, gave instructions as to the filling in of some blanks left for the names of his brothers, demurred to the bequest of a gold watch and chain contained in it, stating that he had no gold chain, and, when he finished reading it, stated that the will was expressed exactly as he desired and that he would not change a word of it. He then called in his physician, Dr. Millburn, and his pastor, the Reverend Mr. Jaffray, who were in the adjoining room, and asked them to witness its execution. He explained to them in detail the legal formalities necessary, stating that it was not necessary that they should know its contents, but that he should know the contents, which he did, that he should acknowledge it as his will, that two witnesses were necessary, and that all should be present and see each other sign. When in the act of signing, or as he was about to sign, he said to them: "You must be prepared to say that I know what I am doing, that I am in my right mind." He then turned to Mr. Jaffray and said: "What do you say? Am I in my right mind?" To which the latter replied: "You are all right; it would take a clever man to puzzle you now." He then said to Dr. Millburn: "Medicus, what do you think? Am I compos mentis?" To which the latter replied, "You are all right." Deceased then signed the will in their presence, and they with Mr. McNeill then signed as witnesses. Deceased then asked Mr. McNeill to make a copy for him, and the latter, having done so, handed the will and copy to him. He then placed the original will in an envelope and handed it to Mr. McNeill, asking him to take care of it for him.

The evidence shews that the deceased had been for many years prior to his decease of intemperate habits, and had

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on several occasions taken what is known as the gold cure treatment, viz., at the Keeley Institute in Minneapolis, in 1892; at the Baldur Hot Springs some years later; and at the Keeley Institute in Winnipeg about 1896. After the latter treatment he appears to have refrained from intoxicants for about four years, but after that he again lapsed into occasional fits of intemperance and continued thus for several years. These lapses were occasional only, until about 1st February, 1905, but from that time up to the time the will in question was signed he appears to have been under treatment for drinking by his physician, Dr. Millburn, almost continuously, the latter having visited him for that purpose alone on 20 days in February, 17 in March, 14 in April, and every day from 1st to 12th May, upon which last mentioned date he left for Winnipeg to again take the gold cure treatment. He left his house that morning under the influence of liquor, and returned in the same state about 1 o'clock p.m. He left again in the afternoon, and was brought back about 6 o'clock in the evening by one Parker, who had been employed by his wife to look after him. He was then so much under the influence of liquor that he was unable to return home without assistance. He must, therefore, have been intoxicated at the time he signed the will, and had evidently been drinking afresh only a short time before he signed it.

Mr. McNeill states that when deceased first gave him instructions about his will he was in possession of his mental faculties, keenness in knowledge of affairs, knew what he was doing, that his acts were voluntary acts, and that he had not been drinking; that at the time he executed his will no doubt as to his testamentary capacity entered his (Mr. McNeill's) mind; that he thoroughly understood what he was doing; and that in executing the will he was carrying into effect a considered plan. Mr. McNeill admits, however, that deceased told him on 12th May that he must get away, as he felt that he had been drinking too much.

Mr. Jaffray, who was a witness for the defence, is not so clear as to the mental capacity of the deceased at the time he executed the will. He states that he was not in his best mental condition at that time, but was able fairly fully to appreciate the claims of all persons upon him, and was also capable of estimating the influence of his actions to a considerable extent. He admits that deceased was weak

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from the effects of drink, and that his conduct during the evening would indicate that he was not in his best self-contained frame of mind.

The evidence of Dr. Millburn is to the effect that deceased was intoxicated at the time he signed the will and was not in a condition to understand the consequences of his acts or to weigh them, nor was he in a fit condition to understand or appreciate the claims of his relatives or those depending upon him. It is true that Dr. Millburn, upon being asked by the deceased at that time whether he was compos mentis, replied that he was "all right," but he states that his reason for so replying, and for afterwards witnessing the execution of the will, was that he was anxious that deceased should get away that night. This, to my mind, is not a sufficient excuse for the impropriety of his conduct, but it may be that it resulted from his anxiety lest anything should occur to prevent or postpone the departure of the deceased, he being then, in Dr. Millburn's opinion, in a precarious state of health. The evidence of the attending physician as to his patient's mental state is, under ordinary circumstances, entitled to very great weight. (See Wilson v. Wilson, 22 Gr. at p. 39.) The fact that he, in his anxiety for his patient, may have acted indiscreetly should not, in my view, lessen the weight of his evidence to any material extent.

The fact that deceased was intoxicated at the time he made the will is not in itself sufficient to warrant the assumption of testamentary incapacity, but where a person is of lower grade of capacity owing to intemperance a very different degree of proof is required to satisfy the Court that the will contained the real intentions of the testator.

On the other hand, the fact that the deceased, at the time he made the will, appeared to comprehend its contents and to understand the formalities required for its execution, and the importance of the witnesses being able to testify as to his mental soundness, is not sufficient to put it beyond doubt that he possessed testamentary capacity.

In Peterson and Haines's work on legal medicine and toxicology, it is stated, at p. 541 of vol. 1, that during the exhilarating stage of alcoholic indulgences the subject often evinces considerable insight, recalls forgotten subjects, and talks easily and clearly so as often to cause the

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ordinary observer to mistake his mental condition for one of true brilliancy, and that in the ordinary drinker this state of exhilaration from alcohol is often more or less perfectly remembered, but in the periodic inebriate it is frequently a complete blank to the individual after the spree is over.

In Boughton v. Knight, 3 P. & D. 64, Sir James Hannen says at p. 74: "It is essential to the exercise of such a power (of making a will) that the testator shall understand the nature of the act and its effects, shall understand the nature of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. Here, then, we have the degree of mental power which should be insisted upon."

The deceased was a Presbyterian, and his wife a Roman Catholic. They appear to have lived happily together at all times when he was free from the effect of alcohol, but when he was intoxicated there were frequent quarrels between them, due to the fact that when he was in that state he became irritable and inclined to be quarrelsome. The fact that she resented his being in that state led her to indulge in recrimination, which, doubtless, had the effect of intensifying their quarrels. During his drinking bout from 1st to 12th May, there were frequent quarrels, in which he would use abusive language towards her, and upon one occasion he, to use the words of a witness, "tried to grab her," but the witness prevented him.

It is impossible to avoid the conclusion that during his drinking spells, and as the result thereof, he became embittered against his wife, and was inclined to treat her with but scant consideration. Immediately after signing the will he went into the adjoining room, where his wife was, and told her that he had made it, and the dispositions he had made of his estate. The result of this communication was a further quarrel between them. Mr. Jaffray, who was present in the house at the time, advised the deceased to

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destroy the will, and he admits that one of his reasons for so advising him was that he felt that deceased may have been moved by spite to make the provisions he did by his will. Considering his usual treatment of his wife when inebriated, it is to my mind not unreasonable to suppose that such was his motive in making the will. The circumstances under which the communication was made to his wife leads me to think that he may have made it merely in the spirit of boasting that he had by means of the will obtained an advantage over her.

It appears from the evidence that for many years previous to their taking up their residence in Macleod the wife of deceased supported him by means of a business carried on by her in Toronto, and with moneys received by her from her father's estate, he being unable, presumably by reason of his unsteady habits, to obtain remunerative employment; also, that after coming to Macleod she paid his expenses to take the gold cure at Minneapolis, and also her own expenses in accompanying him, amounting in all to about $600, also the expenses of a friend who accompanied him on one of the occasions he took the gold cure at Winnipeg; also, that upon one occasion when they were living in Toronto and he came out west in search of employment and was stranded here, she supplied the money to take him back to Toronto; also, that a portion of his estate consists of property acquired by him with moneys advanced by her. In view of these facts, and assuming that his objects in making the new will were to prevent his estate going to the Roman Catholic church, and to make provision for his sister, it is open to question whether the will was not unreasonably harsh as against his wife, in that he appears to have left it entirely to the discretion of his brothers whether she should receive any portion of the income of the estate, let alone any portion of the corpus. By this statement I do not intend in any way to reflect upon their character or honour, as there is nothing to lead me to think that they would exercise the discretion conferred upon them otherwise than by doing full justice to her in the disposition of both the income and corpus under the terms of the will.

Mr. McNeill states that several weeks after the deceased returned from Winnipeg after making the will, he

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called at his (Mr. McNeill's) office and asked him what his charge was for drawing the will, also whether he had the will. Upon being asked whether he wanted it, deceased replied in the negative, and said: "Be sure and keep it safe because it is important; Mrs. Campbell is giving me no rest concerning it, though I have done what I think is right, but I certainly do not want any little property I leave to go to the Catholic Church." Also that on a subsequent occasion, about October, 1905, deceased again called at his office and asked for and obtained the will, and that on both occasions he was in excellent health and gave no evidence of indulgence in drink.

These statements, coupled with the statements already referred to that deceased had not been drinking when he first gave the instructions for the will, might lead to the view that, although he was intoxicated when he executed it, he was merely carrying out a plan which he had formed when sober. I am not, however, entirely satisfied that Mr. McNeill may not have been mistaken as to the state of the deceased upon any of the occasions referred to. I am satisfied that he was mistaken as to his mental state at the time the will was executed, as I am of the opinion that at that time he was not, to adapt the words of Sir James Hannen already quoted, entirely free from any disorder of the mind which would tend to poison his affections or pervert his sense of right, and that he, therefore, did not possess the requisite testamentary capacity. If Mr. McNeill was mistaken as to his condition at that time, he may also have been mistaken as to his condition upon the other occasions referred to. The evidence shews that his trip to Winnipeg on 12th May did not effect a cure, and that his intemperate habits continued up to the time of his death.

I hold that the document executed by deceased as a will on 12th May, 1905, was executed by him at a time when he was not of sound and disposing mind, and that it is for that reason invalid and should be set aside, and that plaintiff is entitled to a declaration to that effect.

The further declaration applied for by plaintiff, viz., that the will of 24th June, 1897, is the last will and testament of deceased, is one which I think I ought not to make. There is no evidence to shew that deceased may not have made another valid will subsequent to it. Apart from this,

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there does not appear to me to be any necessity for such a declaration, as plaintiff may obtain the necessary relief by an application for probate.

As defendants were bound, by reason of their fiduciary capacity, to leave the question of the validity of the will of 12th May to the determination of the Court, I think they should not be mulcted in costs. In my view, the proper order to make is that the costs of both parties be paid out of the estate, and I so order.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 7TH, 1906.

TRIAL.

TROTTER v. RUSSELL.

Sale of Goods—Conditional Sale of Horses—Lien Notes—Default—Vendors Resuming Possession—Insecurity of Payments—Action to Recover Balance after Sale or Exchange of Horses—Collateral Agreement—Oral Evidence — Admissibility—Pleading—Claim for Feeding and Stabling Horses.

An action upon three lien notes against J. C. Russell and T. N. Russell. Defendant T. N. Russell, only, appeared and defended the action. The lien notes in question were given for the price of horses and a set of harness sold by plaintiffs to defendants. Plaintiffs repossessed themselves of the horses and sold or traded them off, and applied the proceeds of the sales or exchanges, as the case might be, on account of the notes. There was a claim for feeding and stabling some of these horses.

E. L. Elwood, Moosomin, for plaintiffs.

E. A. C. McLorg, Moosomin, for defendant T. N. Russell.

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WETMORE, J.:—The plaintiffs' statement of claim was very badly drawn, and in consequence I find myself very much embarrassed in reaching a conclusion. I may also state that plaintiff Alexander Trotter was a very indifferent witness, and a great deal of his testimony appeared to be guess-work. However, he has sworn to sufficient positive facts to establish a case. If there had been any contradictory testimony, I think Mr. Trotter would not have been considered a very reliable witness, but, as it happens, there is no testimony on the part of the defendant, and Trotter's testimony must be accepted as correct.

At the time of the sale of the horses and the harness defendants took possession thereof, and the lien notes contained a provision that if they made default in payment, or if plaintiffs should consider the notes insecure, they had full power to declare such notes due and payable forthwith, and to take possession of and sell the property at public or private sale, and apply the proceeds on account of the notes.

There was an oral agreement between plaintiffs and defendants at the time of the making of the last two notes, on 7th June, 1904, that defendants were to pay $200 a month on account of the sale. The admission of this testimony was objected to, on the ground that this was an oral agreement contradicting the terms of the notes, inasmuch as one was payable on 1st December, 1904, and the other on 1st January, 1906. This testimony, however, was pressed in, on the ground that it was material in dealing with the question of the insecurity of the notes. I am of opinion that, under the circumstances, that view is correct, and will not therefore strike the testimony out. The horses and harness were taken to Winnipeg, and the horses worked there. The $200 a month was not paid, and one of the plaintiffs proceeded to Winnipeg to see about it. He found the horses in very poor condition; he had a conversation with the defendant T. N. Russell, asked him about the condition of the horses, and was told by him that he had been sick, whereupon the plaintiff asked him what he was going to do about the horses, and the defendant replied that he was unable to do anything; Trotter thereupon said that the best thing probably that he could do was to take the horses back, and the defendant said he thought so, and helped him to load

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them on the train, and sent his man from Winnipeg to Brandon with the plaintiff, and he also told him to do the best he could do with them, and he would pay his share of the loss.

The other defendant, J. C. Russell, had gone away, and was then in Ottawa.

I think, under such circumstances, plaintiffs were justified in coming to the conclusion that the notes were insecure, and, at any rate, the repossessing was done with the consent of the defendant who is defending this action.

As stated before, the difficulty I have had in this matter has been with the pleadings. There was no allegation in the statement of claim that plaintiffs repossessed the horses or that they had any authority to do so, and that objection was raised by the statement of defence. This was amended at the trial, in a rather unsatisfactory way, I must confess; that is, the repossession is distinctly alleged, but the right to repossess is set out in a very indifferent manner; however, I think there is enough to warrant me in coming to the conclusion that there is an allegation of a right to repossess. The allegation is that "the plaintiffs under the terms contained in said agreements in writing repossessed said horses and incurred the expenses hereinafter mentioned in taking possession of, and in keeping until the same were sold, some of the horses mentioned in said agreements in writing." The allegation, it will be perceived, is that the plaintiffs repossessed "under the terms contained in said agreements." One of the terms was that if the plaintiffs considered the notes insecure they could repossess the property, and Alexander Trotter has sworn that he did consider the notes insecure, and, as I have already stated, he was justified in doing so. Moreover, no objection was taken to the admission of this testimony. I therefore hold that the plaintiffs were warranted in taking possession of the horses.

It was also contended that the provisions of secs. 7 and 8 of ch. 44 of the Consolidated Ordinances were not complied with. This transaction, however, took place in the province of Manitoba, and this Ordinance was not applicable.

It was further objected that plaintiffs were not justified in trading any of these horses. The evidence was, as I have already stated, that the horses were in very bad condition, and Alexander Trotter was requested by defendant T. N.

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Russell to do the best he could with them. I am of opinion under the evidence that he did do the best he could with them by trading them; the defendants in every instance got the benefit of the trade. If there was a trade, and a difference was coming to plaintiffs, it was applied on these notes, and the sale prices of the animals received in exchange, when they were sold, were also applied to these notes, and the result seems to me, under the circumstances, to be very advantageous for defendants.

As to the feeding and stabling; this is a charge for the keep of these animals that were seized, and those that were received in the trades, until they were respectively disposed of. I am of opinion that the charge for this is excessive. Plaintiffs have charged what the current prices were at livery stables per day for the keep of each horse; I think it would establish a very dangerous precedent to allow persons who are entitled to repossess property of this character under similar liens to make this charge at such prices. The temptation to make profit might induce persons to hold the property for an unreasonable time. I am of opinion that plaintiffs ought not to be allowed more than what was actually necessary to keep the horses; they should not be allowed any profit. I shall therefore only allow half of what they have charged for these services, namely, $100.25.

I have figured out the amount that is due on the lien notes in question. These notes bear interest at 8 per cent. until maturity, and after maturity at 10 per cent. I have considered all the notes due on 22nd September, 1904, when plaintiffs took possession of the property, and have allowed 8 per cent. down to that date; after that date I have allowed 10 per cent., of course crediting the amounts of differences received on exchange of horses and the amounts received on sales of horses from time to time as they respectively occurred. In this way I make the amount due on the notes on this date somewhat more than the plaintiffs' claim. I possibly have made some mistake and will accept the amount as claimed in the statement of claim as due on 9th February, 1905, $109.13, and allowing interest on that at 10 per cent. leaves due at this date $118.09, and allowing $100.25 for stabling and feeding, makes a total of $218.34, for which amount plaintiffs will have judgment with costs.

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NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. DECEMBER 18TH, 1906.

TRIAL.

BOOTH v. BEECHEY.

Fraud and Misrepresentation—Lease of Land—Representations as to Value and Condition of Land Untrue in Fact but Made in Good Faith—Counterclaim for Damages for Deceit—Dismissal—Money Demand—Items.

Action for a money demand, and counterclaim also for a money demand and for damages for false representations.

Ford Jones, Regina, for plaintiff.

W. M. Martin, Regina, for defendant.

NEWLANDS, J.:—The moneys claimed by plaintiffs in his statement of claim, as amended at the trial, with the exception of the sum of $35 claimed for goods sold and delivered, being admitted to be due, plaintiff will have judgment for the same with interest and costs.

As to the item of $35 for goods sold and delivered, it was admitted that defendant borrowed the goods from plaintiff but never returned them. Plaintiff will therefore have judgment for a return of the goods, or their value, viz., $35.

As to defendant's counterclaim, I disallow the item of $30 for commission on horses purchased, also the item of $10 for loss occasioned by leaving the granary door open, as there was no evidence that this was done by plaintiff. I allow defendant $18 per head freight on 6 horses, $108, less $67.50, the amount of plaintiff's money which defendant had after purchasing the horses. Also $20 for feed of horses, $4 for hauling lumber, and $20 for discing and harrowing 8 acres of land at $2.50 per acre.

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Plaintiff had leased his farm to defendant, who agreed to pay him for the same one-third of the crop raised. According to the evidence there were 3,660 bushels of wheat raised. Of this plaintiff would be entitled to 1,220 bushels. He, however, received 1,529 bushels; he will therefore pay defendant the value of 309 bushels, which I find to be worth 49 cents per bushel, a total of $151.41.

Defendant also counterclaims damages for that plaintiff in an agreement with defendant, partly written and partly oral, to lease plaintiff's farm at Loon Creek, falsely and wilfully represented to defendant that there were 130 acres of summer-fallowed land and 40 acres of breaking on said land ready for crop; that there was a good well on said premises, 100 acres of land fenced for pasture, and granary accommodation on said land for 7,000 bushels of grain; while in fact there were only 90 acres of summer-fallowed land and 26 acres of breaking, there was no well, no land fenced for pasture, and a granary with only accommodation for 4,000 bushels of grain.

The evidence shews that plaintiff was never on this land before leasing to defendant; that he had purchased it from one Scott the autumn before and took it on his representations; that he made the representations to defendant honestly believing that Scott had told him the truth; that defendant went on the land under the lease and remained in possession during the term; that he made no complaint to defendant until after the completion of his term; and that the first notice plaintiff had of the claim for damages was when defendant filed his counterclaim.

In a similar case, Legge v. Croker, 1 B. & B. 505, 12 Rev. Rep. 49, the Lord Chancellor of Ireland (Lord Manners) said: "It appears, that pending the treaty, and before any agreement was concluded (for I find no article had been previously signed), Colonel Legge asked the defendant if the public had any right of way through the grounds; the defendant replied that they had not; and on this representation it is alleged, Colonel Legge was induced to take the lease. On a subsequent interview it appears that Colonel Legge reduced the minutes of the agreement to writing; and it was agreed that defendant should prepare the lease; he afterwards gave a draft of the lease to the plaintiff, who had it in his possession about ten days, and it appears that neither

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the draft, nor the lease that was afterwards prepared from it, contains any stipulation or covenant in respect of the right of way. Then arises the question, whether, under the head of fraud or mistake, the defendant is bound to make good the injury the plaintiff has sustained by reason of the right of way being established; and if he is, whether that is to be done by altogether rescinding the contract and cancelling the lease, or by making compensation by way of damages? . . . The case appears to me to bear some resemblance to the sale of a horse where the vendor says he believes the horse to be sound, but will not warrant him; now to make him liable the purchaser must prove the scienter, which is the gist of the action, that at the time he asserted he was sound, he knew him to be unsound. So here, Mr. Croker says, that in his opinion, the fact is so, and assigns the reason for that opinion, and when the leases are prepared, this is not followed up by a covenant to that effect. The case could have been materially different if wilful misrepresentation, or omission, had been made out; it is sufficient for me to say they form no part of the case before the Court."

In Manson v. Thacker, 7 Ch. D. 620, it was held that a purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject matter of the conveyance. In delivering judgment, Malins, V.-C., said: "I apprehend that upon every principle the purchaser, having investigated the title and looked at the property, must be taken to have been satisfied. I do not express any opinion as to whether he might not have been entitled to compensation, or even to rescind his contract, if he had discovered the culvert before he completed his purchase. But the purchaser here has had ample opportunity of examining the property, for there was no concealment, and he ought to have discovered this defect before he completed his purchase."

In Besley v. Besley, 9 Ch. D. 103, there was a claim for damages on account of a misrepresentation of the length of time a lease had to run, made when the parties were entering into a sub-lease. In delivering judgment Malins, V.-C., said: "Under these circumstances, what are the rights of

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the parties? It has been laid down as a rule that a purchaser must be wise in time, and it is quite immaterial whether the rule is applied to a purchaser for valuable consideration or to a lessee, because a lessee is a purchaser for value, and is equally bound to look into the facts connected with the subject of the lease as a purchaser is to look into the matters connected with his purchase. That is clearly shewn by the case of Legge v. Croker; and Lord St. Leonards, in his Vendors and Purchasers, says that a purchaser cannot recover his purchase money after the conveyance is executed, either at law or in equity."

In Brownlie v. Campbell, 5 App. Cas. at p. 937, Lord Selborne, L.C., said: "It appears to me that the cases which have been decided in this country and in Ireland are to the same effect. During the course of the argument I called the attention of the learned counsel for the appellant to what was said in the judgment given in this House by Lord Cottenham in the well-known case of Wilde v. Gibson, and more particularly to the case of Legge v. Croker there referred to, apparently with approbation, which was before Lord Manners in Ireland, and which has in some respects a close resemblance to this case. There a positive statement was made that there had been a decision against a right of way. It was bona fide believed that there had been such a decision, but when it was examined it was found not to exclude every sort of right of way, but only a certain kind; and one other kind, not excluded by it, remained, and was eventually established. That representation having been believed to be true at the time it was made, and having been made in good faith, it was held, after conveyance, by the Court, that it was no ground for relief in equity, either by way of compensation, or by setting aside the contract."

In Brett v. Clowser, 5 C. P. D. 376, there was a claim for compensation arising out of a misrepresentation made by an auctioneer in selling leasehold premises upon the faith of which plaintiff bought the lease at a higher rate than he would otherwise have paid. Denman, J., in delivering judgment, said (p. 389): "The cases in which misrepresentations have been held to afford a defence to a suit for specific performance, or even to entitle the purchaser to specific performance with compensation, or to entitle him to rescind the contract, do not conflict with the doctrine acted upon in

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Legge v. Croker. That case appears to me to be identical with the present in principle; for I can see no distinction between the inaccurate denial of the servitude in the one case, and the inaccurate assertion of the quasi-easement in the other."

In Joliffe v. Baker, 11 Q. B. D. 255, the vendor of real property, during the negotiations for the sale, made a representation to the purchaser, bona fide, and believing it to be true, that the pieces of land sold contained 3 acres, whereas they contained a less quantity. After completion of the contract and execution of the conveyance, the purchaser sought to recover compensation from the vendor for the false representation. The Court held that after completion such compensation could not be recovered unless there had been fraud. In discussing the question of fraud, A. L. Smith, J., said: "If a man makes a statement knowing it to be untrue, with the intention that another should act upon it, that obviously is fraud; so also if a man recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which, in my opinion, is necessary to maintain an action for damages for deceit. If a man makes a statement which he believes to be true, but which is in fact untrue, even though made with the intention that another should act upon it, this, in my judgment, will not suffice to maintain an action for damages for deceit. In the present case the necessary moral turpitude is wanting. It seems to me to be misleading to talk of legal fraud in such a case as distinguished from moral fraud, and I adopt what was said by Bramwell, L.J., upon the point in Weir v. Bell, 3 Ex. D. 243. In my judgment fraud, as above described, and nothing short of it, must be established to sustain an action for damages for deceit."

In this case I have found that there was no fraud on the part of the plaintiff in making the representations he did, and, as the contract has been fully completed, and the term for which the premises were let has expired, the defendant cannot recover any compensation on account of these representations being untrue.

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NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 14TH, 1906.

TRIAL.

McCORMICK v. ANDERSON.

BEACH v. ANDERSON.

Execution—Seizure of Grain—Claim by Purchaser — Sale for Valuable Consideration—Absence of Notice or Knowledge of Execution — Actual and Continued Change of Possession—What Amounts to.

Interpleader issue.

B. B. Teed, Alameda, for the execution creditors.

J. D. Murphy, Oxbow, for the claimants.

WETMORE, J.:—Two executions, one at the suit of each of the plaintiffs respectively, were lodged with the sheriff against the goods of the defendant. The sheriff seized a quantity of grain under these executions, and Walsh Bros. claimed it. The sheriff interpleaded, and the matter came before me to be disposed of in a summary way.

The facts of the case are practically uncontradicted. The claimants by agreement dated 31st March, 1904, sold to Anderson the north half of section 20, township 3, range 2, for the sum of $6,400, payable with interest at 7 per cent. The purchase money was to be paid in wheat grown upon the property, to be delivered each and every year at an elevator in Oxbow, in the name of and as the property of the claimants, until the whole amount with interest was paid. No grain was delivered on account of this contract. There was some grain delivered, the proceeds of which were applied in the payment of moneys guaranteed by the claimants for Anderson, and on a store account which the claimants had against him. The seizure was made by the sheriff's officer on the 8th or 9th October, 1906. The week previous to such seizure Charles Walsh, one of the claim-

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ants, was at the place in question, and apparently Anderson proposed giving up the property (the land above mentioned), or intended giving it up, and it was arranged that he should do so, and that the claimants would receive it back, and that all the grain in the granary on the place should be taken possession of and held by the claimants as their property for the use by the defendant of the land in question. Walsh thereupon, with the assistance of Anderson and a man named Cronk, hauled a couple of loads from the field into the granary. Walsh then, with the assistance of Anderson, fastened the building up by putting boards over the windows and nailing them with spikes, and he procured a padlock and fastened the door, and so left it.

I hold this to be a sale by Anderson to the claimants, and that such sale was for a valuable consideration; and that as between Anderson and Walsh Bros. there was a delivery of the grain in question by Anderson to Walsh Bros. and a receipt and acceptance thereof by them. It was not set up that the grain in this granary was more than sufficient to fairly compensate the claimants in view of the facts that this man had for two years had the use of these premises, and that the claimants had lost the benefit of their sale. The claimants had no knowledge of an execution at the suit of McCormick et al., and no notice, at the time that they took over this property, that the execution at the suit of McCormick et al. was in the hands of the sheriff. The evidence, however, is not so clear with respect to notice as to the execution of Beach et al.; Mr. Charles Walsh testified that he did not know that Beach and Deyell had a judgment against Anderson, and that he first found out that they had when Mr. Murphy (that is, the sheriff) notified him. I am inclined to think that the onus of proving want of notice is on the person purchasing from the execution debtor, and there is nothing in the testimony to shew when the sheriff notified Walsh about this execution. However, as no objection was raised on the part of either of the execution creditors that the claimants had notice of either of these executions or that they had not proved that they had not such notice at the time that they obtained the property from Anderson, I feel justified in drawing the conclusion that the claimants had no notice of either of these executions at the time they took possession of the grain from Anderson. The defendant Anderson,

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after the granary was so fastened up, remained upon the land in question and continued there until the time of the seizure. He and his family subsequently, however, moved away from the property altogether.

The question arises whether this amounts to such an actual and continued change of possession as is contemplated by Rule 356 of the Judicature Ordinance. That Rule is as follows: "Except as hereinafter mentioned, every writ of execution against goods and chattels shall, at and from the time of its delivery to the sheriff to be executed, bind all the goods and chattels, or any interest in all the goods and chattels, of the judgment debtor within the judicial district of the said sheriff, and shall take priority to any chattel mortgage, bill of sale, or assignment for the benefit of all or any of the creditors of the judgment debtor, executed by him after the receipt by the sheriff of such writ of execution, or which by virtue of the provisions of the Bills of Sales Ordinance has not taken effect prior to such receipt as against the creditors or creditors' interest under the execution, but shall not take priority to a bona fide sale by the judgment debtor, followed by an actual and continued change of possession, of any of his goods and chattels, without actual notice to the purchaser that such writ is in the hands of the sheriff of the judicial district wherein the said judgment debtor resides or carries on business."

I held in Mueller v. Cameron, 2 W. L. R. at p. 526, that "in order to constitute an actual change of possession within the meaning of the Rule, there must be a change of possession of a character similar to that which is required under the Bills of Sales Ordinance." I am still of that opinion. It was held in Danford v. Danford, 8 A. R. 518, that in order to create a change of possession under the Ontario statute there must be such a change as would be visible and apparent to the public; and I, in Mueller v. Cameron, apparently referred to that case with approval. I am still of opinion that that case correctly lays down the law. Here there was no such change of possession as would be visible and apparent to the public. Cronk and Anderson did not constitute the public. Any person coming on the premises and finding Anderson in possession would come to the conclusion that he was still in possession of the granary and its contents. The boarding it up

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and locking it was no notice to the public whatever. I am therefore of opinion that the claimants must fail.

There will be judgment that the property in question is that of the execution creditors under the seizure; that the claimants be barred; that no action be brought against the sheriff; that the execution creditors pay the sheriff his costs of interpleader, including possession money, from the date of the service of the notice of claim to this date, if any; and that the claimants pay to the execution creditors their costs of and incidental to the interpleader proceedings, including the costs and expenses so ordered to be paid to the sheriff.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 27TH, 1906.

CHAMBERS.

RE McKAY.

Executors and Administrators—Sale of Land of Intestate by Public Administrator at Undervalue — Employment of Expert Valuers—Duty of Administrator as Trustee.

Application by the public administrator to have his accounts as administrator of the estate of William McKay, deceased, passed and allowed.

E. A. C. McLorg, Moosomin, administrator in person.

T. D. Brown, Moosomin, for Grace McKay, the widow of deceased.

WETMORE, J.:—Some question arose as to the amount received or that ought to have been received by the administrator for some oats and a waggon and harness. I think the difficulty with respect to this property has arisen from the fact that one of the schedules to Mr. McLorg's affidavit has been carelessly drawn. It turns out that the deceased had

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only a half interest in the harness and waggon. As to the oats—they were grown upon the deceased's homestead by one Reid, who worked the land upon shares, and the deceased was only entitled to one-third of the oats in question.

The principal dispute in this matter arises with respect to the sale of the land of the deceased. The deceased had homesteaded the north-west quarter of 14-5-1, west of second, but he had not completed his homestead duties at the time of his death, and the administrator, in the exercise of his judgment, applied to the government land department and purchased the quarter section (which he was allowed to do) at $3 an acre. This land is situated in the vicinity of Oxbow, and the administrator resides at Moosomin, 70 miles and upwards from Oxbow. The administrator employed an advocate residing at Oxbow to attend to some matters in connection with the estate, and he received through such advocate notice that one Chappel was prepared to purchase the land for $900, and the advocate stated at the same time that the average price of land around the locality was about $7 an acre on time. The administrator then sent one Buelly, a real estate agent, out to the land to inspect and value it. This man had been engaged in the real estate business in Oxbow and neighbourhood for three years prior to his being so sent out, and he went to the land and made a personal inspection of it, and made a detailed report by affidavit, in which he stated that he had carefully examined the land; that of the 160 acres which constituted the quarter section, 25 or 30 acres were sloughs, fairly deep and full of water at that time of the year, which was in July; that these sloughs were all surrounded by bluffs; that the rest of the property consisted of arable land composed of black loam and clay subsoil; that the south half of the quarter section was rather badly cut up with pot-holes, and that the north half was far the better half; that for a cash sale between $5 and $6 per acre would be a fair value, and he stated that he principally based his opinion on the fact that a few days previous he had sold three-quarters of a section of first-class land in the same neighbourhood on time for $7.50 an acre, and that such land was far better than the land in question; and that there were no improvements upon the land except 23 to 25 acres that had been in cultivation, which it would be necessary to summer-fallow immediately, and a small shack, which was of no value. The administrator also obtained an affidavit from

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one Winteringham, a farmer who had been residing near Oxbow for the past 15 years, and who professed to have a thorough knowledge of the land in that locality, who swore that he was acquainted with the land in question, and stated that in his belief the cash value of the land for the purpose of sale was about $6 per acre, and that his estimate was made from his knowledge of the land and after carefully examining it. Both Buelly and Winteringham are men of good repute. The administrator, upon the strength of these sworn representations, in the exercise of his discretion, sold the land to Chappel for $900.

Grace McKay, the widow, and the only person interested in this estate, appeared by counsel at the return of the Chambers summons and presented some affidavits which put an entirely different feature upon the value of this property. In the first place, the affidavit of one Thomas Baird was read, who is also a real estate agent resident at Oxbow, where he had been carrying on such business for 5 years, and who stated that he had an intimate knowledge of the value of land in the vicinity, and that he was well acquainted with the land in question, and he valued it in the month of July, 1906 (when Buelly and Winteringham made their valuations), at $12 an acre. His affidavit, however, is general, and does not go into details in the way that Buelly's affidavit does. Affidavits were also produced from George Matthewson and Justus B. Smith, who are farmers residing in the vicinity of Oxbow, and who professed to have knowledge of the value of land there, and to have been frequently over the quarter section in question, and they put about the same value as Baird did on the land in the month of July, 1905, namely, $2,000. Baird also swore that he was informed by Messrs. Matthewson and Smith and one W. Noble, and he believed, that Chappel in the same month (July, 1905), in which he purchased the land, sold it for $12 an acre. I may say that I am not placing very much reliance upon this statement in this affidavit, because two of his informants, Smith and Matthewson, made affidavits, and they say nothing therein of any such sale.

It is contended that the administrator sold the land for too small a price, and that he is responsible to make good to the estate the difference between $900 and $2,000, namely, $1,100.

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Mr. McLorg applied for an issue as to the value of the land or for leave to cross-examine Baird, Matthewson, and Smith upon their affidavits. I was disposed to grant that application, but Mr. T. D. Brown, who appeared for the widow, stated that he had rather take my decision upon the material before me than go to the expense of an issue or cross-examination.

I may say that I do not feel inclined, under such a state of facts, to hold the administrator responsible for the amount so claimed on the part of the widow, without giving him an opportunity at least of cross-examining these deponents; I think it would be manifestly unfair to do so, because I have no hesitation in holding that the administrator acted bona fide in what he did. I might say, therefore, that for the reason alone that he has not had an opportunity to have a full inquiry into the matter, and that the next of kin prefers that such opportunity should not be afforded, I would only charge him with the $900 for which he sold the land, but I also think that under the authorities he is not responsible for any more than that. It is laid down by Lord Watson in Learoyd v. Whiteley, 12 App. Cas. at p. 733, that "as a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs." In Whiteley v. Learoyd, 33 Ch. D. at p. 350, Cotton, L.J., lays down the following: "In my opinion a trustee is not bound to have special knowledge. Where there is any special knowledge required, he may and ought to consult those who could advise him from their special knowledge—lawyers, in the case of legal matters, and experts as to the value of property where there is any question as to the value of property." And in Learoyd v. Whiteley, 12 App. Cas. at p. 731, Halsbury, L.C., says: "I think it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law, and in this case I do not deny that he would be entitled to rely on a valuer upon a pure question of valuation." Mr. McLorg is an advocate and would not be supposed to have a knowledge of the value of real estate, especially so far away as this property was situated from where he resided. The sole question here to consider with respect to selling this property was the market cash value of it, and I am of opinion

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that in obtaining the valuation of this land for sale purposes from Buelly and Winteringham, he did exercise "that degree of diligence that a man of ordinary prudence would exercise in the management of his own private affairs." I cannot see what more he could have done than he did do. I am of opinion, therefore, that the administrator ought not to be charged with more than the sum of $900, which he actually received from the sale of the property.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. DECEMBER 31ST, 1906.

TRIAL.

JONES v. ENGLAND.

Promissory Note—Indorsement by Payee to Agent for Collection—Action by Payee—Holder of Note—Note Payable at Particular Place—Bills of Exchange Act, sec. 86—Necessity for Presentment to Hold Maker—Failure to Present—Dismissal of Action—Costs.

Action on a promissory note.

M. McCausland, for plaintiff.

C. E. D. Wood, for defendant.

NEWLANDS, J.:—This is an action on a promissory note made by defendant payable to plaintiff. Before suit plaintiff indorsed the note "Pay to the order of M. McCausland," signed the same, and handed it to Mr. McCausland as his solicitor for collection. No value was given by McCausland. On this state of facts defendant contends that plaintiff was not the holder of the note at the commencement of the action.

It seems to me, however, that, as no property in the note passed to McCausland, and as he took it merely as agent for plaintiff, that plaintiff would still be the holder of the note, and, although McCausland could have sued upon it in his

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own name, he could have done so merely as agent for plaintiff: Solomon v. Bank of England, 13 East 135; De La Chaumette v. Bank of England, 9 M. & W. 208. McCausland could not therefore be the holder of the note: Marston v. Allan, 8 M. & W. 494; Bradlaugh v. Dekin, L. R. 3 C. P. 538; and therefore plaintiff has the right to recover.

Defendant also contends that, though the note was payable at the Union Bank of Canada at Regina, it was not before action brought presented there for payment (this is not denied by plaintiff), and therefore plaintiff cannot recover. In support of this contention plaintiff cites Warner v. Symon-Kaye Syndicate, 27 N. S. R. 340, where the Supreme Court of Nova Scotia held that where a note was payable at a particular place it must be presented for payment before action. Mr. Justice Graham, after citing sec. 86 of the Bills of Exchange Act, 1890, said: "First, there is the expression 'must,' which is imperative. Here, too, it is dealing with the necessity of presentment in the case of the maker and the maker only, because sub-secs. 2 and 3 deal with the necessity of presentment is order to make the indorser liable. Then the maxim expressio unius exclusio alterius is to be applied to this provision: 'But the maker is not discharged by the omission to present the note for payment on the day it matures.' Some effect must be given to a clause like that. The same may be said of this further clause: 'If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable.' The provision as to costs will have effect too, in this as well as in the other case, namely, that, if the maker succeeds on the ground that there has been no presentment proved, the Court may still deprive him of the costs usually given to a successful suitor."

On behalf of defendant there was cited the opinion of Armour, C.J., in Merchants Bank of Canada v. Henderson, 28 O. R. 360, where he said (p. 365): "The effect of this provision seems to be that it is still necessary in order to charge the indorser that such a note should be presented for payment at the particular place on the day it falls due; but that to charge the maker, it is unnecessary that it should be so presented, but that it may be so presented at any time before action brought, and that an action may be brought upon it against the maker, even without any presentation at the particular place, at the risk of the plaintiff being obliged

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to pay the costs of such action in case the maker shall shew that he had the money at the particular place to answer the note when the note fell due and thereafter; but it may be that the effect of this provision is that, as far as the maker of such a promissory note is concerned, the promissory note is to be deemed and taken to be a promise by him to pay generally; but it is unnecessary to determine the effect of this provision in determining this case."

As the decision of the Supreme Court of Nova Scotia is a considered one, and the opinion of Armour, C.J., only an obiter dictum, and as I agree with the reasons given by Graham, E.J., I have come to the conclusion that the first mentioned is the correct interpretation of sec. 86, and I therefore think that the objection is fatal and that there must be a judgment for defendant.

As to the question of costs, which by the section are in the discretion of the Court, I think that before defendant should be entitled to costs he should prove that he had the money in the Union Bank of Canada at Regina, the place where the note was payable, from the time the note was due until the commencement of this action, and, as there is no evidence that such was the case, the judgment will be without costs to either party.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. DECEMBER 31ST, 1906.

TRIAL.

BLACKSTOCK v. WILLIAMS.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Making out Contract—Letter — Offer to Sell or Quotation of Price—Oral Acceptance.

Action for specific performance of a contract.

F. W. G. Haultain, K.C., for plaintiffs.

N. MacKenzie, Regina. for defendant.

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NEWLANDS, J.:—This action is for the specific performance of an agreement alleged to have been entered into between plaintiffs and defendant. The following letter contains the proposal made by defendant and orally accepted by plaintiffs:—

Regina, April 18th, 1906.

To Messrs. Blackstock & Co., Regina, Sask.:

Gentlemen,—The best I can consider upon lots 36, 37, 38, 39, 40, 41, and 42 in block 287, and good up to the 19th inst. at 6 o'clock p.m., is as follows:—

175 ft. at $150, $26,250.50

under agreement at the following terms

$2,500.00 cash
3,750.00 June 1st, 1906
10,000.00 Jany 1st, 1907
10,000.00 June 1st, 1907.

Interest at the rate of 7% from date of sale.

Yours very truly,

R. H. Williams.

It is contended on behalf of the plaintiffs that the above letter and acceptance form a complete contract, and on behalf of the defence that there is no offer to sell but only a quotation of a price that defendant would consider if made to him by plaintiffs.

Lord Morris in Harvey v. Facey, [1893] A. C. at p. 556, said: "The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry."

I have therefore to consider whether this letter is the mere quotation of a price or a definite offer to sell. The letter evidently contemplates a sale. It is to be "good up to the 19th instant at 6 o'clock p.m.," and after the lowest price is quoted it states it is to be "under agreement at the following terms," which on acceptance would make a com- the rate of 7 per cent. from date of sale." All these expressions point towards a sale being intended, although he does not say "I will sell you this land for $26,250 on the following terms," which on acceptance would make a complete contract.

It is, however, urged on the part of defendant that this interpretation cannot be put on the letter, because the de-

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fendant starts out by saying "The best I can consider," and because he has reserved the right to consider it implies that he has not made up his mind to sell, but was still going to think over the transaction, and that the very point he wished to consider was the vital one as to whether he would sell or not. If this letter, therefore, shews that defendant had not definitely made up his mind to sell, there would be nothing for plaintiffs to accept, and it would still be open to defendant to accept or refuse to sell after plaintiffs intimated that they would give the price on the terms mentioned.

The letter has all the appearance of being an offer to sell, and it is with considerable hesitation that I have come to the conclusion that defendant has, by the use of the words "The best I can consider," reserved to himself the right to reject the offer on plaintiffs expressing their willingness to accept his terms, and that therefore there is no agreement that can be enforced between the parties.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JANUARY 4TH, 1907.

CHAMBERS.

RE NUGENT.

Executors and Administrators — Distribution of Estate—Claims of Creditors—Sale of Household Furniture—Liability of Proceeds—Exemptions Ordinance—Payment to Manager of Estate—Remuneration of Administratrix—Notice to Creditors—Claims Sent in Late — Insolvent Estate—Pro Rata Distribution.

Application by the administratrix of the estate of George E. Nugent, deceased, to have her further accounts passed and allowed.

J. T. Brown, Moosomin, for the administratrix.

E. L. Elwood, Moosomin, for the Rat Portage Lumber Company and others, creditors.

E. A. C. McLorg, Moosomin, for Codville & Company and others, creditors.

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WETMORE, J.:—The matter was referred to the clerk to take an account of the assets on hand and the disbursements and payments made by the administratrix, and to report. The clerk having made his report, some objections were raised to it. In the first place, it is contended on behalf of the administratrix that she should not be charged with the household furniture, as it is exempt from being applied in payment of debts. This property, if exempt at all, is only so exempt by virtue of the Exemptions Ordinance, C. O. ch. 27. That Ordinance exempts furniture and household furnishing, etc., from seizure under execution to the extent of $500, and, then, by sec. 5, "In case of the death of the execution debtor, his property exempt from seizure under execution shall be exempt from seizure under execution against his personal representative, if the said property is in the use and enjoyment of the widow and children or widow or children of the deceased, and is necessary for the maintenance and support of said widow and children or any of them." It was urged that because this property would be exempt from seizure under execution against the representative of the deceased, it is, within the spirit of this section, exempt from being made liable by the administratrix or creditors for payment of debts due by the deceased to the same extent. I very much doubt whether that is correct. This is a statutory provision taking away common law rights, and I think must be strictly construed, and the facts must bring the case within the words of the enactment. Clearly, the facts of this case are not within the words of sec. 5; in fact, no execution has been issued at all against anybody, and the Ordinance only applies to exemptions from seizure under execution. There is nothing in this case to satisfactorily establish that this furniture was necessary for the support of the widow or children of the deceased; the fact that they sold it, in my opinion, points strongly in the direction that it was not so necessary. The creditors are therefore entitled to participate in the money realized from the sale of this furniture.

It was objected on the part of the creditors that an allowance was made to Rawson for his services. I think that for the same reason as stated in my former judgment in this case (2 W. L. R. 3) Rawson is entitled to be paid for services, and I think the amount allowed by the clerk is not unreasonable. I do not propose, however, to allow any further remuneration to the administratrix, as she really has

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been merely a figurehead throughout the whole of these transactions. Rawson is the person who really administered the estate.

Some question arises with respect to the distribution among the creditors of the amount which will be on hand after the costs and expenses are paid. The administratrix, having obtained an order for the purpose, duly published notice to creditors to send in claims in pursuance of Rule 595 of the Judicature Ordinance. Claims were accordingly put in, within the time prescribed by the notice, and the administratrix proceeded to pay 50 cents on the dollar of the claims so put in, and she paid a large number of them at that rate. There were a number of these claims so put in with respect to which the administratrix had doubts as to their validity as claims against the estate, and she did not pay 50 cents on the dollar on them. Subsequently, and after the administratrix had determined to pay 50 cents on the dollar, and so paid a large number of such claims at that rate, and after the time provided in the notice for putting in claims, one James Franks and one William L. Martin filed claims; Franks for $22.80, and Martin for $2,820.20. The administratrix intends allowing Franks's claim as put in, and Martin's claim at $2,776.85. The administratrix, after such claims of Franks and Martin were put in, was satisfied that those other claims to which I have referred, which were put in within the time provided in the notice, and upon which she had made no payments, were correct and proper accounts against the estate, and she proposes paying 50 cents on the dollar on these claims. It seems that after making these payments and paying the further costs incidental to passing these accounts, there will not remain sufficient to pay 50 cents on the dollar to Franks and Martin, and it is contended for Franks and Martin that with respect to what will remain on hand for payment of debts they are entitled to be paid pro rata with those other creditors who filed their claims in accordance with the notice but have not been paid. I am of opinion that Rule 595 was passed for the protection of the executor or administrator, and it is quite clear that when she proceeded to distribute the estate by paying 50 cents on the dollar, those persons who had filed valid claims and were not paid their proportion were entitled to be paid. They were entitled to stand in

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the same position as the other creditors whose claims were then recognized, and if they were not put in that position they would have their remedy over against the administratrix. By virtue of the Rule when the administratrix proceeded to distribute the estate she was to so distribute it "having regard to the claims" of which she had notice, that is, notice as provided by the Rule. She had such notice of those claims. Therefore, when she concluded to pay 50 cents on the dollar, she did so with the impression that she would be safe in doing it, so I assume, and it is reasonable to suppose, that in considering this she took also into consideration that these claims might possibly turn out well founded. I think, therefore, as these creditors ought to have then been paid this 50 cents on the dollar, they must occupy the position of being entitled to obtain what they ought to have got, and therefore they are entitled to be paid it now. If these persons had been paid the 50 cents on the dollar at the time they ought to have got it, Franks and Martin would not have been entitled to get 50 cents on the dollar when they put their claims in, because it would not have been there for them to get, and, in my opinion, the mere fact that the administratrix, not being satisfied of the validity of the claim, took the matter into consideration, does not put Franks and Martin in any better position. I hold, therefore, that the creditors mentioned in paragraph 10 of Rawson's affidavit are entitled to be paid 50 cents on the dollar, and that Martin and Franks, out of what remains of the estate for payment to creditors, will be entitled to receive their amounts up to 50 cents on the dollar, if there is enough for the purpose, and any balance remaining will be distributed pro rata among all the creditors who have properly filed claims. If after paying the creditors mentioned in paragraph 10 of Rawson's affidavit 50 cents on the dollar, there is not enough remaining to pay Franks and Martin 50 cents on the dollar, the amount so remaining will be divided pro rata between them.

The clerk's report affirmed.

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YUKON TERRITORY.

MACAULAY, J. OCTOBER 15TH, 1906.

CHAMBERS.

SELLANDER v. JENSEN.

Attachment of Debts—Garnishee Summons — Affidavit of Judgment Creditor — Information and Belief — No Grounds Shewn—Setting aside Proceedings — Non-disclosure of Answer to Summons—Praecipe for Writ of Execution—Judgment—Costs—Practice.

Application by the garnishees for an order setting aside a garnishee summons issued on 10th August, 1906; the order of MACAULAY, J., made on 21st September, 1906; and the writ of execution issued on 21st September, 1906, on the following grounds:—

First, that the affidavit of plaintiff sworn on 9th August, 1906, upon which the garnishee summons was obtained, did not comply with the requirements of sec. 382 of the Judicature Ordinance; and in paragraph 3 of the affidavit plaintiff, in deposing as to material parts therein, deposed "to the best of his knowledge and belief" without giving the reasons therefor.

Second, that the order of 21st September, 1906, should be set aside, because (a) at the time of service of the garnishee summons the garnishees were indebted to the defendant in the sum of $10 and no more; (b) in making the application for the order the plaintiff did not disclose to the Judge an answer to the garnishee summons contained in a letter addressed to plaintiff's solicitor by the garnishees and stating their indebtedness to defendant to be in the sum of $10 at the time of service, and no more; (c) the garnishees, in forwarding the letter to the plaintiff's solicitor, believed they had complied with the requirements of the garnishee summons, and the order was made against them in error.

Third, the writ of execution should be set aside, because (a) the præcipe for the writ did not comply with the requirements of sec. 343 of the Judicature Ordinance; (b) the requirements of sec. 354 of the Judicature Ordinance, as to the form of the writ, were not complied with; (c) no judg-

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ment was entered against the garnishees under which a writ of execution might issue as against them.

F. J. McDougal, for the garnishees.

J. A. Clarke, for plaintiff.

MACAULAY, J.:—The affidavit upon which the garnishee summons was obtained was an affidavit on information and belief. In the third paragraph thereof the plaintiff says: "To the best of my knowledge and belief H. Plageman and Fred Rice are indebted to the said defendant."

No reasons were given by plaintiff in his affidavit shewing the grounds of belief upon which he founded his application.

It has been held in the English Courts that "evidence on information and belief is admissible as to the indebtedness of a garnishee, provided the reasons for such information and belief are given in the affidavit, but not otherwise."

In Quartz Co. v. Beall, 20 Ch. D. 508, Jessel, M.R., held that it was absolutely necessary that the grounds upon which such belief is founded should be given in order that the affidavit might be used.

In Vinall v. Ernest de Pass, [1892] A. C. 90, the House of Lords unanimously held that "an affidavit that deponent is informed and verily believes that the garnishee is indebted to the judgment debtor is sufficient, provided it shews the grounds of belief, but not otherwise."

In Lumley v. Osborne, [1901] 1 Q. B. 532, it was held "that the statement of the plaintiff's sources of information and grounds of belief that the person against whom the judgment summons is sought was a partner, is a material part of the form, and that its omission from the affidavit will render irregular the issue of the summons and all subsequent proceedings thereon."

In my opinion, the first ground taken by the garnishees in their application to set aside the garnishee summons issued by the plaintiff is fatal. The affidavits do not disclose the reasons for belief, as required by the authorities, and the garnishee summons and the subsequent proceedings taken thereon must therefore be set aside as irregular, and consequently it will be unnecessary for me to deal with the other grounds mentioned in the notice of motion.

However, I think it is only fair to state that there was no sufficient proof made to me that the plaintiff's solicitor

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did receive any such letter as the garnishees say they wrote to him.

In regard to the præcipe, I am of opinion that it was sufficiently regular in form to have obtained the writ of execution, provided there had been no other irregularities.

In regard to the point taken that no judgment had been entered on the order for judgment issued by myself pursuant to Rule 387 of the Judicature Act, it seems to have been the practice in the office of the clerk of the Court here, in order to avoid what he considered unnecessary costs, to issue execution on the Judge's order for judgment in garnishee matters under that Rule, without first entering up a formal judgment in pursuance of the order.

No doubt such a procedure would save considerable costs, and, without expressing an opinion as to the correctness of such a practice, I may say that, although the costs would be somewhat increased by entering up the final judgment in pursuance of such an order, it may be the safer course to adopt.

For the reasons above stated, the motion will be allowed and the garnishee summons and proceedings taken thereunder set aside with costs.

YUKON TERRITORY.

MACAULAY, J. OCTOBER 29TH, 1906.

CHAMBERS.

RE STEINBERGER.

Constitutional Law—Order in Council of Dominion Government Providing for Enforcement of Miners' Liens in Yukon Territory—Intra Vires—Dominion Mining Lands—Procedure—Lien on Detached Machinery and Chattels—Ultra Vires—Lien for Wood Supplied—Time for Registration—Form of Lien—Lien of Miners' Cook for Wages—Affidavit of Agent—Proofs of Claims—Contract of Mine Owner with Layman—Waiver of Lien—Rights of Sub-contractors—Costs.

Applications by John Drabason and others, miners, wage-earners, or wood dealers, for the enforcement of their

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liens for moneys due by Jennie Steinberger, layman on creek placer mining claims Nos. 11 and 11A. on Eldorado creek, in the Yukon Territory, under the Dominion order in council or Ordinance respecting Miners' Liens, 1906.

J. A. Clarke, for the applicants.

F. J. Stacpoole, for the owner.

MACAULAY, J.:—The first question I will deal with is the constitutionality of the Ordinance, which has been raised in this case by counsel for the owner, or original lessee from the Crown, of the mining claims, who argues that the Act, in specifying the mode of procedure to be followed in the enforcement of liens under its provisions, is ultra vires of the Dominion Government, because under sec. 92 of the British North America Act power was given to the provincial legislatures to exclusively make laws in relation to matters coming within the classes of subjects enumerated therein: "No. 13: Property and civil rights in the province. No. 14. The administration of justice in the province, including the construction, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts;" and that the Dominion government, in attempting to lay down the procedure to be followed in civil matters, such as the enforcement of a lien would be under this Act, was arrogating to itself powers that were exclusively given to the provincial legislatures under sec. 92 of the B. N. A. Act.

It is admitted, however, that the lands in question are Dominion lands, and by sec. 91 of the B. N. A. Act it is provided that "Parliament shall have power in relation to all matters coming within section 91," and that its authority under that section is exclusive. Item 1 of that section covers public debts and property.

These mining lands never passed to the Territory and still remain the property of the Dominion, and, under sec. 47 of the Lands Act, the Dominion Parliament has exclusive authority to legislate by way of orders in council.

It was held by Craig, J., in this Court, in the case of Re Henry Burg, that "a lien Ordinance passed by the legislative council of this Territory was ultra vires because it

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attempted to pass laws affecting Dominion property, contrary to the provisions of sec. 91 of the B. N. A. Act."

On the argument before me it was not contended that Parliament had not authority to pass an Act affecting any of the items mentioned under sec. 91 of the B. N. A. Act, but that in attempting to deal with the mode of procedure to be followed in the Courts it was then transgressing and interfering with the exclusive powers given to the legislatures under the provisions of sec. 92 of the same Act.

In Cushing v. Dupuy, 5 App. Cas. 409, on appeal from the Court of Queen's Bench for Quebec, Canada, to the Privy Council, under the bankruptcy and insolvency law, in which it was contended that under item 21 of sec. 91 of the B. N. A. Act affecting bankruptcy and insolvency, the Dominion Parliament was ultra vires in attempting to lay down procedure to be followed in such a case, Sir Montague E. Smith, who delivered the judgment of the Board, says: "It was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of that province. The answer to this objection is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the original rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subject of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to this subject might affect them."

In Valin v. Langlois, an appeal from the Supreme Court of Canada, reported in 5 App. Cas. 115, as to "the power of the Dominion Parliament to regulate the procedure in connection with the trial by provincial Courts of controverted election cases arising out of elections to the House

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of Commons"—the Supreme Court of Canada having held that Parliament had such powers—leave to appeal was refused by the Privy Council, the judgment of the Court being delivered by Lord Selborne, who held that the Dominion had the power to so regulate procedure in election cases.

Clement's Canadian Constitution, at p. 237, says: "The power of the Dominion Parliament to regulate procedure in connection with the trial by provincial Courts of controverted election cases arising out of elections to the House of Commons has scarcely been questioned."

In McKilligan v. Machar, 3 Man. L. R., Killam, J., in discussing the constitutional aspect of the case, says:—"The provincial legislature has the authority to regulate the administration of justice in that province, including procedure in civil matters in the Courts, though it has, in some cases, been held that the Dominion Parliament could establish Courts for the determination of matters arising under statutes within its powers, or perhaps regulate to some extent procedure in the ordinary Courts in suits upon subjects within its legislative authority."

In the present case the Governor-General, by order in council, simply declares that the procedure now in force in the Territorial Court here by originating summons "shall be the procedure to be followed in suits for enforcing claims under the provisions of this Act."

There is no doubt but what the Governor in council had the power to pass a lien law affecting property, which undoubtedly came within its exclusive jurisdiction under sec. 91 of the B. N. A. Act. According to the authorities cited, the right to define the procedure was incident to the right to pass the Act; and whether it is a matter of defining a procedure or directing that a certain defined procedure should be followed by the Courts, I am of the opinion that it was within its legislative rights in so defining or directing, and that the order in council passed on 26th May, 1906, was clearly within the legislative powers given to the Dominion Parliament under the provisions of sec. 91 of the B. N. A. Act, and consequently I hold that the order is constitutional, in so far as it directs that "a lien may be filed against the said mining claim with the appurtenances thereto, the minerals or ore produced therefrom, and the lands occupied thereby or enjoyed there-

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with," or "upon the machinery and chattels upon such land," in case the same are attached to the land and become a part of it.

Section 3 of the order states, among other things, that "there shall be a lien upon the machinery and chattels upon such lands." Of course such lien could only attach to the machinery and chattels upon the lands in case they became attached to and formed part of the said lands. If, however, they are detached from the lands they come within the provisions of sec. 92 of the B. N. A. Act, by which exclusive jurisdiction has been given to the provinces, and the Dominion Parliament in such case would have no right to deal with them, and if it were intended by the order that a lien should attach to detached machinery and chattels upon such lands, such order, in my opinion, in so far as it attempts to deal with such detached machinery and chattels, is ultra vires, but is intra vires in all other respects. It may be, however, that the machinery and chattels mentioned in sec. 3 were such machinery and chattels only as were attached to the land and became a part of it, in which case a lien might be enforced against them.

Having come to the conclusion that the Governor in council by order in council had the power to pass the Lien Act above mentioned, I will now deal with the case on its merits.

The first claim that I will consider is the claim of John Drabason, who filed a claim for supplying wood to the layman Jennie Steinberger, and performing work in and upon the claims in question. Under sec. 9 of the Lien Ordinance, it is provided that "the claim may be registered at any time within 30 days after the last day's labour for which the wages are payable, or on which wood was furnished, or within 30 days after the time fixed for payment, if the labour is performed, or wood furnished, between the 1st day of November of any year and the 30th day of April in the following year, at any time within 30 days after the said 30th day of April."

Drabason in his claim says there was no fixed period of credit, said wood being payable on demand and said wages being payable upon performance of the work by the claimant. The last work done in his case was on 20th July, 1906. The Act itself did not come into force until

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1st July, 1906, and consequently I am of opinion that no liens would attach for work done or material supplied previous to that date. Drabason on 11th or 14th July hauled wood from 18 Eldorado to 11 Eldorado, for which he charges $28.50, and on 20th July one cord and 85 feet at $16 per cord, $26.75, or a total of $55.25. This would be the total amount to which he would be entitled under the Act if I hold that liens should at all attach.

Objection was taken to the form of lien filed, contention being made that the affidavit of verification does not give a sufficient description of deponent as required by Rule 299 of the Judicature Act. The affidavit and lien attached, in my opinion, sufficiently describe Drabason and are sufficiently regular to entitle him to a lien for the amount above mentioned, if I conclude that liens should attach at all.

The next claim I will consider is the claim of G. T. Tida, who claims a lien as cook for the miners working upon the above ground.

In Davis v. Crown Point Mining Co., 3 O. L. R. 69, it was held that "a blacksmith employed for sharpening and keeping tools in order for the work of mining is entitled to a lien for his wages on the mining location, but a cook who does the cooking for the men employed is not." MacMahon, J., in giving judgment in that case, says: "It was necessary that the workmen at the mine should be fed, but the cooking of food could not be regarded as any work or service upon or in respect of the mining."

In McCormick v. Los Angeles City Water Co., 40 Cal. 185, the plaintiff was employed by the contractor or superintendent to cook for the men engaged in excavating the reservoir, and the cooking was done on the ground as the work progressed. It was held that the plaintiff was not entitled to a lien. The Court said: "If any lien exists, it arises not from the place where the cooking was done, but from the nature of the service and its relation to the work which was being constructed. If the plaintiff can assert a lien on the facts proved, he could as well have done so had the cooking been performed at any other place."

Under these authorities, I am of opinion that in any event the cook Tida has no lien for work as cook. In Anderson v. Goodsal, 7 B. C. R. 404, it was also held that

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a cook at a mine had no lien for wages. This claim must be dismissed with costs.

The next claim I will consider is the claim of Con. Harkness. This man appears to have worked for 27 days in July, and, I think, is entitled to a lien for the proportionate amount of his wages claimed for the time he worked. The same objection was taken to the form of this lien, that it did not sufficiently describe the party, but I am of opinion that the claim filed has been sufficiently regular to entitle the plaintiff to succeed in so far as the form of his claim is concerned.

In regard to the claims of John T. Graham, Arthur G. Anderson, and Louis Roy, I am of opinion that the claims filed are sufficiently regular to entitle the claimants on those grounds to a lien for the proportionate amount of their claims earned by them after 1st July, 1906.

Objection was taken by counsel for the mine owner that the affidavit in Roy's case having been made by an agent, and the agent not saying that he was possessed of personal knowledge, as provided by the Act, was defective. While the agent does not state that he has a personal knowledge in so many words, he does swear as a fact that the statements contained in the affidavit are true. The affidavit is a joint affidavit, and the men were working together, and consequently I am of opinion that it is sufficiently regular to prove the claims of the workmen mentioned therein.

Also the claim of James Campbell, who performed work between the 8th and 17th July, 1906, I think has been regularly proved, and he should be entitled to $45 as claimed, if the liens are otherwise held to be good.

In this case the lease, or lay agreement, entered into on 15th May, 1905, between William C. Leake, the owner, and Mrs. Jennie Steinberger, the layman, provided, among other things, that the layman should have "no right to lien against the said mining claims or any part of their product by reason of work performed thereon or supplies furnished thereto," and it was further provided that "no workmen should be employed by the layman to work on said claims until such workmen should have agreed in writing to waive all rights and remedies which he may have under the provisions of any Ordinance respecting the pro-

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tection of miners' wages against the share of the party of the first part, or against the said mining properties, and the failure on the part of the party of the second part to obtain such a written agreement from the workmen should operate as a cancellation of the lay, and upon the layman hiring any person contrary to the provisions of the agreement the agreement itself should become null and void."

It was argued by counsel for the mine owner that upon the hiring of Con. Harkness, the first person to be hired upon the claim without having signed such an agreement, the lay therefore became null and void on 14th July, 1906. The mine owner, however, took no steps to cancel the lay under the provisions of the agreement, and consequently I am of the opinion that by his conduct he waived his rights to have the lay cancelled.

It was further contended by counsel for the mine owner that the layman, or contractor, having entered into an agreement to waive any lien that he might have, no sub-contractor could be possessed of greater rights than the original contractor, and that consequently no liens should attach. He cited the case of Forhan v. Lalonde, 27 Gr. 600, decided by Blake, V.-C. The head-note is: "In a building contract for the erection of a church the contractor agreed with the building committee to settle with all persons doing work upon, or furnishing materials for, the construction thereof, and stipulated that neither he nor they should have any lien upon the building for their work or materials:—Held, binding on the sub-contractors, though made without their knowledge or assent." The Vice-Chancellor held that the rights of a sub-contractor grow out of the rights of the contractor by whom he is employed, and are limited to the rights of the latter.

Counsel argued that any workman employed by the layman upon work in connection with a mine became ipso facto a sub-contractor of the layman, and cited from Holmested on Mechanics' Liens at p. 4, in which a sub-contractor is defined as follows :" A sub-contractor shall mean a person not contracting with or employed directly by the owner or agent for the purposes aforesaid, but contracting with or employed by a contractor, or, under him, by another sub-contractor." Holmested at p. 6 says: "By the definition here given of a sub-contractor it would seem to include all sub-contractors in however remote a degree

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they may stand from the original contractor." He further says: "The Act in some places appears to treat persons working for wages as a class distinct from contractors or sub-contractors, but it is clear that such persons must, according as their contract is made either with an owner or a contractor or sub-contractor, come under one or other of these classes, though by reason of the preference given to wage-earners they constitute to some extent, when contractors, a preferential class."

After the judgment in Forhan v. Lalonde the Ontario Act was amended, and now it is provided that "any agreement or bargain, verbal or written, express or implied, entered into by any workman, servant, labourer, mechanic, or other person, employed in any kind of manual labour intended to be dealt with by this Act, by which they agree to deprive themselves of the benefit of this Act, shall be null and void."

I am in considerable doubt as to whether or not I should hold, under the Act before me, that a miner (who is defined by the Act as meaning "any person working upon a mining claim or in connection therewith") is a sub-contractor and entitled to no greater benefits than is the original contractor, the layman, but in Forhan v. Lalonde the contractor not only stipulated for himself but for all other persons. In this case the layman only stipulated that she should not have any lien, and agreed to engage no person to work upon the mine unless they agreed to waive any rights they might have to a lien under any Act in force in the Territory. I am inclined, however, to treat the miner, or workman, rather as a class distinct from the contractor or sub-contractor, and am of the opinion that they are workmen or wage-earners and entitled to their claim for liens under the Act.

A further objection was taken by counsel for the mine owner that while some of the workmen only worked on claim number 11 Eldorado, they filed their claims for 11 and 11A. The lay was given on numbers 11 and 11A Eldorado creek, to be worked together. It was not possible that the workmen could be employed on both claims at the same time, even although they were united for the purpose of working. I do not think that this objection should prevail, but that the liens of those miners who have filed their liens against 11 and 11A should be allowed as against those

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claims. Those who have confined themselves to claim number 11 or number 11A should be limited to the claim against which their liens have been filed, with the appurtenances thereto, the minerals or ore produced therefrom, the lands occupied thereby or enjoyed therewith, and the machinery and chattels upon such lands which have been attached to the lands and form a part thereof, but not otherwise as against such machinery and chattels.

I am further of opinion that the lien holders whose liens have been allowed should be entitled to their costs of these proceedings.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 6TH, 1906.

TRIAL.

GODWIN v. SAWYER.

Sale of Goods—Action for Price—Counterclaim for Damages for Inferior Quality—Examination before Shipping—Usage of Trade—Merchantable Goods—Acceptance—Examination after Arrival at Destination—Knowledge of Specific Purpose for which Goods Required—Sales of Goods Ordinance.

This action was brought by J. W. Godwin & Co. and J. B. Powles & Co. to recover $508.38, balance due for goods sold and delivered by J. W. Godwin & Co. to defendant, and interest thereon from 4th December, 1903. The claim of Godwin & Co. was assigned to J. B. Powles, who in turn again assigned to J. B. Powles & Co.

F. L. Gwillim, for plaintiffs.

R. L. Ashbaugh, for defendant.

MACAULAY, J.:—The goods in question were some 800 sacks of potatoes which the defendant ordered by wire in the autumn of 1903 from J. B. Agen & Co., of Seattle, among other goods which he was ordering through Agen & Co. at the same time. Agen & Co., not being in a posi-

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tion to fill the order in regard to the potatoes, handed it over to J. W. Godwin & Co., who forwarded the potatoes to Skagway, whence they arrived in due course at Dawson.

The order was given late in the autumn, and plaintiffs say that the boat on which they shipped them was one of the very last boats by which the shipment could be made in order to insure their arrival in Dawson before the closing of the Yukon river.

The defendant in his defence sets up, among other things, that "the goods were sold to the defendant by the plaintiffs, who warranted them to be of a quality and description merchantable in the Yukon Territory, and that the said goods were not of the description or quality warranted, and consequently were of very much less value to the defendant than they otherwise would have beeen;" that part of the potatoes were of the quality known as "cuts," that is, some were knotty potatoes with the knots broken off and some were affected with what is known as dry rot, and consequently only portions of those potatoes could be used, the potatoes being cut and the good portions put together and sold for about one-half the price of the ordinary market for merchantable potatoes; and defendant states that he suffered damage to the extent of some $2,500, and counterclaims as against plaintiffs for that sum.

Some questions arose as to the right of the plaintiffs to sue, and as to their rights under the statutes of the State of Washington to assign a chose in action in order to enter suit for the recovery of the same. It will not be necessary for me to deal with these questions, owing to the view I have taken of this case.

The evidence of the plaintiff J. B. Powles and one R. H. Williamson, who was his salesman, was taken by commission, and, after stating the circumstances shewing the connection with Powles and Godwin & Co. with this sale through Agen & Co., they state that the potatoes shipped were of a good and merchantable quality; that they had just arrived in Seattle from California a short time previous to the order having been received for them. They examined the potatoes and found them to be of good quality. "There were no cuts in them—first class—good size," and they were not of an inferior quality. They state, however, that the examination of the potatoes made by them was by taking 12 of the 800 sacks and ripping them open at the

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end and looking at them. Finding them all right, and knowing that the potatoes were California potatoes, they shipped them on to Skagway.

It is admitted that after reaching White Horse the potatoes were transferred to a steamboat to come to Dawson, but that owing to the heavy run of ice in the river the steamer could not come all the way through, and they were again transhipped to a scow and brought to Dawson.

There were a number of sacks that were frozen, for which the defendant makes no claim in his counterclaim, but after the potatoes arrived in Dawson they were brought to Wilson's warehouse, where they were thoroughly assorted by one Albert S. Lobley. Mr. Lobley is a man who had large experience in the city of Chicago, where he was employed by dealers in potatoes who dealt in car-loads. He says that a proper examination of potatoes could not be made, or of such a quantity of potatoes as were shipped here, by opening 12 sacks and examining potatoes in the sack; that the only proper way to examine potatoes is to dump them all out in a pile and assort them, because, he says, "you may find that cuts or very small potatoes are very often put in the centre of the bag, and first class potatoes must be properly picked and assorted, and that is the only manner in which a proper examination of potatoes can be made."

Mr. Lobley assorted all these potatoes when they arrived at Wilson's warehouse in Dawson. He states that many sacks were frozen, but that, besides the frozen potatoes, some of the potatoes were very good and some were watery—were what are known as low-land potatoes, or potatoes grown on low land—and were not a first class potato, but nevertheless marketable. He states further that some of these potatoes were affected with what is known as dry rot, and that no one with any knowledge of potatoes could have handled them without having discovered that they were so affected, and had they been thoroughly examined at Seattle that plaintiffs must have known that they were so affected; that some were knotty potatoes—what are known to the trade as "cuts"—and would only sell for half price. He states that the potatoes that were so affected with dry rot, and the knotty potatoes, which he picked out and separated from the others, amounted to not less than 5 or 6 tons; that those were absolutely apart

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from any affection or injury that any of the potatoes received from the frost; that he picked the frozen potatoes separately and distinctly from this 5 or 6 tons.

I was very much impressed with Mr. Lobley's evidence. He was undoubtedly a man who had been accustomed to handling potatoes in large quantities, and his statement that no proper inspection could be made in the manner in which plaintiffs attempted to inspect the potatoes, seems most reasonable to me. Their opening a dozen sacks out of 800 by ripping open the side of the sack, in my opinion, was no proper inspection, and I am quite satisfied that the only proper manner in which such an inspection could be made was in the way stated by Mr. Lobley.

The defendant placed several witnesses in the box who were merchants dealing in produce in Dawson, to shew what the usage of trade was, or custom, in the shipping of perishables from Puget Sound points to Dawson. These gentlemen swore that for the last 4 or 5 years the dealers at any of the shipping points on Puget Sound knew that only goods of the first quality were wanted in Dawson, and that when they sent out an order it was understood by the merchant or dealer who filled the order that no other goods than those of the best quality should be sent, and nothing of an inferior quality. The reason given was that the first cost of an article purchased at any of the Puget Sound points for the Dawson trade was a mere bagatelle when considered in connection with the cost as laid down in Dawson. The cost of transportation is so enormous that it leaves the first cost a mere trifle, and it is so understood by dealers at the Puget Sound shipping points. However, they stated that they generally asked for the best quality. Whether or not such is the custom I do not think it necessary for me to decide here, because in the present order no mention was made as to the quality, and, although I must find, on the evidence submitted to me by the different witnesses, that these potatoes, or a large portion of them, were not of the best quality, I still find they were merchantable and marketable potatoes with the exception of the 5 or 6 tons which Mr. Lobley picked out and which were the knotty potatoes and those affected with dry rot.

It was argued by plaintiffs' counsel that when defendant accepted those potatoes at Skagway he exercised any

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option he had and was precluded now from objecting to their quality,

The plaintiffs in their evidence state they knew the potatoes were for the Dawson market. It would be most unreasonable to expect defendant to make an examination of those goods at Skagway. He did make an examination almost immediately after their arrival in Dawson.

Under sub-sec. 1 of sec. 16 of ch. 35 of the Consolidated Ordinances of the Yukon Territory, known as the Sales of Goods Ordinance, it is enacted as follows: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be a manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose." And sub-sec. B. of sec. 13 enacts as follows: "Where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract expressed or implied to that effect."

Defendant in this case, in my opinion, made an examination of the goods as soon as reasonably could be expected after their arrival here. There were some 44 tons of potatoes in the shipment, and of these it is clearly shewn to me that at least 5 tons were affected in the manner above stated, and only brought on the market half the price that potatoes were selling for at the time. There was evidence to shew that later on more of these potatoes were affected, and that defendant lost several tons of them which had to be dumped into the river. I do not think I have anything to do with that question. That may have been the result of the frost that affected them on the way down to Dawson, for which plaintiffs were not liable, or they may have become unfit for sale from other causes, but I am absolutely convinced that at least 5 tons of those potatoes, as stated in Mr. Lobley's evidence, were not merchantable potatoes, because they were knotty potatoes or

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affected with dry rot or both. If they only sold for half price, that would be equal to two and a half tons of good potatoes. The evidence submitted to me shewed generally that potatoes were selling at the time from 13½ cents to 15 cents per pound on the Dawson market. Mr. Lobley in his evidence, however, states that he thinks some potatoes at that time were being sold as low as 12 cents a pound, and for the purpose of fixing the amount that I think defendant is entitled to as damages on his counterclaim in this action, I will take the lowest market price, or 12 cents a pound. Two and a half tons of potatoes would be 5,000 pounds, which, at 12 cents a pound, would be $600.

Plaintiffs' claim was for $508.38. The damages I find defendant entitled to by reason of the inferior quality of some of the potatoes, as above stated, is $600, so that plaintiffs' action will be dismissed with costs, and defendant will be entitled to a judgment against plaintiffs on his counterclaim for the difference between the $600 and $508.38, or $91.62, with costs on the higher scale.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 6TH, 1906.

CHAMBERS.

McCANN v. DOLAN.

Payment out of Court—Money Paid in by Defendant with Defence—Rule 133—Indebtedness not Denied—Application for Payment out to Plaintiff—Refusal—Discretion—Circumstances of New Territory.

Application by plaintiff for an order directing payment out of Court to plaintiffs of $170, paid in to the credit of this action by defendant with an admission of his indebtedness to plaintiff to that amount.

F. J. McDougal, for plaintiff.

J. P. Smith, for defendant.

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MACAULAY, J.:—Rule 133 of the Yukon Judicature Ordinance, clause 3, provides as follows: "When the liability of the defendant in respect of the claim or cause of action, in satisfaction of which the payment into Court is made, is not denied in the defence, the moneys paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a Judge otherwise order."

There is a similar provision in the English Judicature Act (Snow & Birney, 1905, p. 298, Order xxii., Rule 5), and in Grey v. Bartholomew, [1895], 1 Q. B. 209, in which Dunn v. Devon and Exeter Constitutional Newspaper Co. is cited and distinguished, it was held under the Rule that where the indebtedness is not denied in the statement of defence of the defendant, as appears in the case before me, the plaintiff is entitled to have the moneys paid out to him, unless the Judge, in his discretion, should otherwise order.

I have always maintained that the conditions which exist here are so absolutely different from the conditions existing in an old and settled community, that a Judge should, at many times, exercise a different discretion in dealing with matters coming before him in this Territory than he would if similar matters came before him in an older and more settled community. In old settled communities people, as a general rule, maintain their residence in the community for a lifetime, or, in any event, for a number of years. In this Territory we find people here to-day and away to-morrow, and where money has been paid into Court under circumstances that might permit of some injury being suffered by one or more of the litigants, by reason of its payment out before the final disposition of the action, I have always maintained that the safest course to pursue, and wherever possible I have pursued that course, was to hold such money until such final disposition of the case.

It can work no great hardship on plaintiff to be deprived of the amount of money paid in in this case, for, at most, a few months, and it might work a hardship upon defendant if the moneys, which he admits he owes to plaintiff, were paid out to plaintiff, if, on the final disposition of the case, it were held that he had paid into Court the full amount which was owing from him to plaintiff.

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I believe I have the right to exercise the discretion, and I refuse the application for payment out. I think, however, the plaintiff was within his rights in making such application, and while I refuse him the application the costs will be costs in the cause to the successful party.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 23RD, 1906.

CHAMBERS.

MORLEY v. KLONDIKE MINES R. W. CO.

Arbitration and Award—Motion to Set aside Award—Misconduct of Arbitrators—Gross Undervaluation of Mining Claim in Question—Interested Motives Alleged against Arbitrators — Evidence — Disproof of Charges — Railway Act—Payment out of Court.

Application by plaintiffs to set aside an award dated 2nd August, 1906, made by George Coffee and Edward Simpson, a majority of the arbitrators, on the ground that the award is unjust, improper, unreasonable, and grossly and scandalously inadequate, and that the same was made without regard to the evidence, and on the ground that the majority of arbitrators acted unfairly, improperly, and not as fair or just arbitrators between the parties on such arbitration, or in making such award.

George Black, for plaintiffs.

C. W. C. Tabor, for defendants.

MACAULAY, J.:—The application is made under sub-sec. 3 of sec. 168 of the Dominion Railway Act, the amount awarded having been $300. Sub-sec. 3 provides as follows: "The right to appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards."

Chapter 32 of the Consolidated Ordinances of the Yukon Territory is known as the Arbitration Ordinance. Sec. 12

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provides as follows: "Where an arbitrator or umpire has misconducted himself, the Court or a Judge may remove him. (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

These are the only grounds, apparently, under the Arbitration Ordinance of this Territory, on which an award may be set aside, and it was argued by counsel for defendants on this motion that in considering this application I was confined to the provisions of sec. 12, and could consider only such grounds as were therein provided, and not all the grounds as set out in the notice of motion. However, I think I may fairly consider all the grounds set out in the notice of motion, and am of opinion that they are covered by the provisions of sec. 12 of our Arbitration Ordinance, although the reasons are not so fully set out in sec. 12 as they are in the notice of motion, but I think are fully recovered by the provisions of sec. 12, where it provides that "the award may be set aside where an arbitrator or umpire has misconducted himself, or the award has been improperly procured."

An action was instituted in this Court by the plaintiffs against the Klondike Mines Railway Co., the Dawson, Grand Forks, and Stewart River Railway Corporation, Limited, and Jerome A. Chute, who was the contractor for building the road, on 18th August, 1905, in which the plaintiffs alleged trespass, and claimed damages and an injunction against the defendants to prevent them from building or constructing their road over plaintiffs' property. The proceedings were afterwards amended, and the names of Thomas W. O'Brien and Hugh John Mackenzie, the present contractors, substituted for the name of Jerome A. Chute, the original contractor, who discontinued his contract.

Pursuant to the provisions of the Railway Act of 1903, on 23rd July, 1906 (and after the notice of intention to expropriate had been served on the plaintiffs and the usual affidavit of the Dominion land surveyor filed, in which he sets out that a plan of the land in question was deposited with the registrar of land titles at Dawson, and in which he states that the sum of $300 offered to the plaintiffs, as compensation, by the defendants, is a fair compensation for the land and damages suffered by them), by order of this Court, Samuel L. Stanley, named by the

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railway company, David Cathcart, named by the claim-owners, and George Coffee, named by the Judge, were appointed arbitrators to determine the compensation to be paid thereunder by the Klondike Mines Railway Company to George E. Morley and R. B. Devlin, the plaintiffs, by reason of the location and construction of the railway over and upon their mining claim; the taking of the ground required therefor pursuant to the notice served upon the claim-owners, and the exercise of the powers of the railway company in relation thereto.

Samuel L. Stanley having refused to act as such arbitrator as aforesaid, one Edward Simpson was, by order of this Court, on 26th July, 1906, appointed arbitrator in place of Stanley.

Two of the arbitrators, George Coffee and Edward Simpson, made their award on 2nd August, 1906, awarding to plaintiffs $300 in full compensation for all claims for damages done and land expropriated by the Klondike Mines Railway Company, and, on 28th September, 1906, David Cathcart, the third arbitrator, filed a separate award in which he awarded to plaintiffs $3,000 as compensation for all claims for damages done and lands expropriated by the Klondike Mines Railway Company.

I have examined the evidence taken before the arbitrators, and also the affidavits filed on this motion before me. Defendants submitted no evidence before the arbitrators, and they, therefore, arrived at their conclusions on the evidence submitted by plaintiffs, and upon a personal examination made by the arbitrators themselves of the premises in question.

Plaintiff R. B. Devlin, in his evidence before the arbitrators, places the damages done to him by the expropriation by the railway company of a part of his claim, at $3,000, and says that he has worked a considerable portion of this ground since 1898, and that the means that he could use for profitably working the ground in the future would be ground sluicing or hydraulicing, and the fact of the railway track being placed as it is prevents him from so working his ground. On cross-examination by the arbitrators he says that he would get his water for hydraulicing from Mosquito Creek in the spring and fall. When asked about the tailing grounds he was not sure that he had sufficient tailing grounds, even if the railway had not been

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there, but "pretty near." "The bed rock was pretty flat, and there would not be much grade." When asked if he could tell any of the values that he found in the prospect tunnel that he drove, he answers "No, I can't," but approximately says 5 or 6 cents. When asked as to how much of the claim was worked out, he answers "That I cannot tell you. You will have to look at that for yourself;" and is really not very definite, apparently relying on a personal examination of the ground by the arbitrators.

Mrs. Isabelle Devlin, wife of the plaintiff Devlin, gave evidence as to the amount of money taken out of the claim. In the year 1903, $265; in 1904, $2,357.25; in 1905, $3,194.68. She was of the opinion that over half the claim was left.

One George J. F. Stevens was also sworn, who said he worked on the claim in 1904, and says he thinks the whole mine is worth between $5,000 and $6,000; speaks of the manner of working the claim with the water in the spring and fall obtained from Mosquito Gulch, and thinks about $3,000 a fair compensation. He is not interested in this claim, but in the claim just below, which is also the subject of arbitration in another suit. He says the railway track is practically all on bed rock or nearly so. This is all the evidence offered, except that on 31st July the following note appears: "The committee of arbitration reconvened pursuant to the notice of adjournment of the 27th instant. The arbitrators have made a personal inspection of the ground in question and made tests by means of panning."

In the award of Coffee and Simpson, the arbitrators give no reasons for the conclusions they have arrived at. Neither does Cathcart give any reason for the conclusions he has arrived at.

Under sec. 164 of the Railway Act it is not necesssary that reasons should be given, and the award may not be set aside because of no reasons having been given.

In his affidavit on this motion Mr. R. B. Devlin says that he has operated the claim at a good profit, and has worked the same at intervals for several years past, "and only about one-third of the said claim is worked out." In his evidence before the arbitrators, he would not say how much ground had been worked out, but left that for the arbitrators to

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decide upon, when they made their personal inspection. He says that there are no culverts under the railway, and that the construction of such culverts would cost more than $300, the sum awarded to him. He also reiterates his statement that he has suffered damage to the extent of $3,000.

He further states that after the appointment of George Coffee as arbitrator he learned that he was, during the time he acted as such arbitrator, in the employ of a company that has bought up nearly all of the mining claims upon and adjoining Bonanza Creek, and that it is in the interests of said company to have such claims, before acquiring the same, placed at as low a valuation as possible, and consequently that Coffee is not a fair and impartial arbitrator. He further says that he is informed and believes that the arbitrator Simpson, although not publicly in the employ of the company referred to in paragraph 10, that is, the company by whom he alleges Coffee was employed, was, at the time of the arbitration, engaged in large deals with them, and consequently not a fit and proper person to act as such arbitrator.

An affidavit of David Catheart, the third arbitrator, is also filed on the motion. He states that the construction of the culverts that it would be necessary to build under the railway track in order to operate this claim properly, would cost more than the sum awarded; that upon examining the claim with the arbitrators, and upon panning thereon in their presence, from prospects then obtained and from the evidence given before the arbitrators, the claim is damaged to the extent of $3,000 as contended by the owners. He further says that "in considering this case the arbitrators Coffee and Simpson conceded that in order to work the claim, with the railway constructed as it is, it would be necessary to construct culverts as referred to in paragraph 5 of this affidavit, and no provision has been made for the cost of said culverts in the award."

The affidavit of Thomas W. O'Brien is filed in answer, in which he states he knows the arbitrators George Coffee and Edward Simpson and has known them since 1898; "that the said George Coffee has been actively engaged in placer mining in this country since the year 1898, and has been for several years the manager for the Anglo-Klondike Mining Company, Limited, and has been engaged in carrying

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on hydraulic mining; that the said Edward Simpson has also been engaged in mining operations in this country for several years, and has for the last two years been employed as manager for the White Channel-Gold Hill Hydraulics, Limited; that they are both practical mining men; that he (O'Brien) has lived in the Yukon Territory since the year 1887, and has an extensive knowledge of mining and mining operations, and, in his opinion, the said George Coffee and Edward Simpson are men of honour, and would not lend themselves to favour any party in any question upon which they were called upon to decide; that the grade of the railway across the claim in question is on bed rock, and prior to the construction of such grade the greater portion of the land occupied thereby was covered with tailing piles, which were removed by the contractors at great expense; that he knows the ground in question; has been over it and examined it, and believes the award made by the said Coffee and Simpson herein is just and reasonable."

A further affidavit is filed by C. W. C. Tabor, solicitor for the defendants. He states that he acted as solicitor throughout these proceedings; "that after taking the evidence herein, the said arbitrators visited the mining claim in question, panned thereon, and went over the same to ascertain, as far as possible, what had been worked out, and the said George Coffee took measurements from different points thereon with a tape line; that the arbitrator George Coffee was appointed by Mr. Justice Craig pursuant to the provisions of the Railway Act, 1903, and such appointment was with the consent of all parties; that he knows the connection of the said Simpson with the company referred to in paragraph 12 of the affidavit of the plaintiff Devlin; the said Simpson being at the time engaged in negotiating a sale of the properties of the White Channel-Gold Hill Hydraulics, Limited, in which the said Simpson was interested to the said company, and it was to the interest of the said Simpson and the company which he represented to have the values of mining claims along Bonanza Creek placed at as high a value as possible, in order that he should obtain as high a price as possible for the properties which he represented."

This is all the material used before me on the motion. If the reasons given by Devlin in his affidavit for the arbi-

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trator Coffee endeavouring to place the value of property as low as possible because he was, at the time, employed by a company who were buying mining claims on Bonanza, is a good reason for concluding that he was unfair or unjust, then I am at a loss to understand why he believes that the arbitrator Simpson arrived at the same conclusions as Coffee, because if he were at the time negotiating with the company which Mr. Coffee represented for the sale of his properties to that company, it would certainly be in his interest that the valuations should be placed as high as possible in order that he would obtain the best possible price for the properties which he owned, or was interested in.

Mr. Cathcart, in his affidavit, says that "upon the examination by the arbitrators of the ground, and upon the panning done in their presence, and from the prospects then obtained, he concluded that the amount awarded was far too small." He, however, neglects again in his affidavit, as he did in his award, to enlighten the Court as to what were the prospects which he obtained. Absolutely no light whatever is thrown upon the matter by his affidavit, and he simply leaves the Court in this position, that after examining the ground and obtaining certain prospects which were known to him and the other two arbitrators, and which are in no way disclosed by any of the arbitrators to the Court, the conclusions the other arbitrators arrived at were improper conclusions, but the conclusion that he arrived at is the correct conclusion.

There undoubtedly is a great discrepancy between the conclusions arrived at by the arbitrators Coffee and Simpson and the arbitrator Cathcart. Cathcart places the damages at 10 times the amount that is found by Coffee and Simpson. Undoubtedly the sum of $300 is a very small amount to allow the plaintiffs if the claim in question is worth what they state in their evidence and in their affidavits. The arbitrators, however, were the judges, and in the evidence of Devlin, when asked to give definite statements as to the amount of ground worked out, as to the amount of prospecting done, and as to the actual values, he invariably invited the arbitrators to make a personal inspection. They did make that inspection; they measured the ground; they panned the earth; and the majority of

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them came to the conclusion that the damages to be awarded should be the sum of $300. They give no reasons to shew the Court what prompted them to arrive at those conclusions; neither does the arbitrator Cathcart, who disagrees with them, enlighten the Court in this regard, either in his award or in his affidavit filed on this motion; and it is impossible for the Court to set aside an award unless corruption, partiality, misconduct, or irregularity, is distinctly proved against the arbitrators. Mere suspicion is not sufficient.

The following cases were cited by Mr. Black, counsel for the plaintiffs: Benning v. Atlantic and North Western R. W. Co., 5 Mont. L. R. 136; Re Ontario and Quebec R. W. Co. and Taylor, 6 O. R. 338; James v. Ontario and Quebec R. W. Co., 12 O. R. 624; Great Western R. W. Co. v. Baby, 12 U. C. R. 106; Re Canada Southern R. W. Co. and Norvall, 41 U. C. R. 195; Re Hamilton and North Western R. W. Co., 44 U. C. R. 626; Grand Trunk R. W. Co. v. Coupal, 28 S. C. R. 531; Re Armstrong and James Bay R. W. Co., 12 O. L. R. 137, 7 O. W. R. 713. Mr. Taylor cited the following cases: In re Whitley and Roberts Arbitration, [1891] 1 Ch. 558; Morgan v. Mather, 2 Ves. 15; Russell on Awards, pp. 354, 355; Doberer v. Megaw, 34 S. C. R. 125; McRae v. LeMay, 18 S. C. R. 282; Morley v. Simpson, L. R. 16 Eq. 226; Re Hopper, L. R. 2 Q. B. 375.

I have examined all these authorities and some of the cases referred to in the judgments of the Judges who gave the decisions, and I find no conflict of opinion in any of them. The result of all the authorities is that the Court will not interfere to set aside an award unless corruption, partiality, misconduct, or irregularity, is distinctly proved against the arbitrators, and mere suspicion is not sufficient; or unless the sum awarded is so grossly and scandalously inadequate as to shock one's sense of justice.

It was held in In re Whitley and Roberts Arbitration, [1891] 1 Ch. 558, by Kekewich, J., that "evidence of an admission out of Court by an arbitrator that he made his award improperly, as for example by collusion, or in consequence of a bribe, is not admissible in support of an application to set aside the award."

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There is no evidence before me that would warrant me in finding corruption, partiality, misconduct, or irregularity, on the part of the arbitrators Coffee and Simpson; nor am I warranted in coming to the conclusion that the award is so grossly and scandalously inadequate as to shock one's sense of justice, after reading the evidence submitted before the arbitrators and the affidavits filed before me on this application.

If I were to take the evidence alone, as offered before the arbitrators, I would conclude that the amount found by Coffee and Simpson was less than I should have found on the same evidence, but the plaintiffs invited and requested the arbitrators to visit the premises and make an inspection for themselves. They did make that inspection, and, after making that inspection, concluded that the damages they should award should be $300, and there is nothing before me, either in the evidence or affidavits, to shew that they did not arrive at the proper conclusion.

It would have been much better, in my opinion, had all of the arbitrators given reasons for their conclusions, but they were not bound to do so and did not do so, and I can only decide this application on the material before me, and after examining that material and the authorities submitted I am of opinion that this application should be dismissed with costs.

After the hearing of this application an application was made in this same case by Mr. Tabor, on behalf of the defendants, for payment out of the moneys deposited in Court under the order of Mr. Justice Craig when the matter was referred to arbitration. I reserved my decision, awaiting the result of the application to set aside the award, and stated at that time that if the application to set aside the award was not granted, the application of Mr. Tabor for payment out would be granted as a matter of course. Consequently I do now order that the application for payment out be granted.

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MANITOBA.

DECEMBER 21ST, 1906.

COURT OF APPEAL.

IVESON v. CITY OF WINNIPEG.

Highway — Non-repair — Personal Injury to Pedestrian — Negligence of Municipal Corporation—Notice of Action— Requisites of—Time and Place and Nature of Injury— Sufficiency of Notice.

Plaintiff, a married woman, was walking in a northerly direction, on a wooden sidewalk, on the east side of Main street, within, but near the northerly limit of, the city of Winnipeg. When she was on the part between Polson and Atlantic avenues, a decayed plank broke under her weight. Her left foot went through the break, and she tripped and fell forward on her face. As she fell, her left hand was badly torn, by coming in contact with something on the sidewalk—probably a protruding nail head. She suffered great pain for a long time, and had to be removed to a hospital. Blood poisoning set in from the wound in her hand. Ultimately one of her fingers had to be removed. She had permanently, and almost entirely, lost the use of her left hand. She was, as a result, comparatively helpless and unable to dress herself, or to do any other work requiring the use of two hands.

Within a month after the day of the accident she caused to be served on the city clerk a notice, as follows:

"To the Clerk of the Corporation of the City of Winnipeg:

"Take notice that I, Mary Iveson, wife of Atkinson Iveson, of the city of Winnipeg, in the province of Manitoba, joiner, do hereby give you notice that with respect to the matters herein set out I claim from you the sum of $1,000 damages, and that I intend to commence an action in His Majesty's Court of King's Bench in and for the province of Manitoba, and proceed thereon according to law to recover such sum from you for injuries sustained by me through the omission and default of the said corporation of the city of Winnipeg to keep in repair a public

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sidewalk situate on the east side of Main street between Polson and Bannerman avenues in said city of Winnipeg.

"Dated at Winnipeg this 19th day of August, A.D. 1905.

"MARY IVESON,
"By her attorneys,
"Aikins, Robson, Loftus, & Sparling."

At the time of giving the notice she was not aware that her hand would be permanently disabled.

The sidewalk in question was built by the city about 22 years before the injury to plaintiff. It got old, and was in constant need of repairs.

The system of inspecting it was as follows. A man, who had twelve miles of wooden sidewalks in his district, used to walk over it about 3 times in every 2 weeks. If he noticed a plank that he thought dangerous, he reported the defect. The city's repair gang on the following day replaced the plank with another. The planks so used to replace the condemned ones were taken from the materials of other wooden sidewalks, that had been taken up to make way for granolithic walks. If the repairers, on going to make the repairs, noticed any other defects, they remedied them also.

The evidence shewed that the under sides of planks in such a sidewalk, and the stringers on which they were laid, were likely to rot before the tops of the planks shew rot or defect.

The case was tried before RICHARDS, J., who entered a verdict in favour of plaintiff for $3,000: 4 W. L. R. 53. Defendants appealed.

HOWELL, C.J.A.:—It seems to me there was evidence upon which the Judge might find as he did that the city had permitted the walk to be out of repair and were negligent. There were photographs of the sidewalk produced and a plank and portion of the walk put in as exhibits, and some of plaintiff's witnesses certainly described it as a dangerous walk.

The amount of the damages seemed to me high, but I cannot say that they are so excessive as to require a new trial.

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The sole question upon which we reserved judgment in this matter was the sufficiency of the notice of action. Many cases were cited to us on this question. The Ontario cases might well be described as those beginning with Madden v. Shewer, 2 U. C. R. 117. The statute in that case required, amongst other things, that the notice "should clearly and explicitly contain the cause of action." Following that case and by no means including all on this subject, I refer to Parkyn v. Staples, 19 C. P. 240; Longford v. Kirkpatrick, 2 A. R. 518; Bond v. Conmee, 16 A. R. 404; Scott v. Reburn, 25 O. R. 450—all of which were decided under the same or similar statutes. A number of English cases were also cited, of which it seems to me Martins v. Upcher, 3 Q. B. 662, might be mentioned as the leading case; and the cases of Smith v. West Derby Local Board, 3 C. P. D. 423, and Union Steamship Co. v. Melbourne Harbour Commissioners, 9 App. Cas. 367, might also be referred to.

Lord Denman, C.J., in giving judgment in the case of Martins v. Upcher used the following language: "I decide, however, on the language of the Act, which requires that the cause of action shall be clearly and explicitly contained in the notice; unless both time and place be inserted the cause is not clearly and explicitly contained." The same principle is reiterated by the other Judges, and all the Ontario cases seem to follow this principle. The statute under which Smith v. West Derby Local Board was decided also required that the notice should set forth clearly and explicitly the cause of action, but it was held in that case that the particularity of pleading was not required. The statute under which Union Steamship Co. v. Melbourne Harbour Commissioners was decided required that the notice should clearly and explicitly give certain particulars, and contained many other exact requirements.

The notice under the English Workmen's Compensation Act, like that under the Ontario Act, requires the particulars of the accident and the date to be given, and under that statute the case of Clarkson v. Musgrave, 9 Q. B. D. 386, was decided. The statute of Manitoba requires "that notice of any such claim or action must be served upon the clerk," and nothing else is required. It seems to me that the cases decided under the statutes above referred to, widely differing from the Manitoba statute, cannot be of much assistance

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in deciding what the notice in this case should contain. The case of Madden v. Kensington Vestry, [1892] 1 Q. B. 614, was a case arising out of a statute which required a notice "stating the cause of action or grounds of the proceeding or demand." The case was an appeal from a County Court and came before Judge Denman, and he seemed to take it for granted that the case of Martins v. Upcher was an authority which stood in his way against the validity of the notice in the case before him, and he did not seem to distinguish between the bald requirements in that case and the very strict requirements in the case of Martins v. Upcher, wherein it was held as before mentioned that time and place should be given in the notice because of the strict provisions of the statute. He, however, in that case held the notice good, but in giving judgment he used the following language: "I follow Martins v. Upcher in holding that a place must be mentioned in the notice of action." It seems to me if notice of place is necessary, notice of time also is necessary.

The case of St. John v. Christie, 21 S. C. R. 1, was decided under a statute which contained the following section:—"No action shall be brought against any person for anything done by virtue of an office held under any of the provisions of this title, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the county where the cause of action arose."

This section, it seems to me, requires as little particularity in the notice as the section in the Manitoba statute. Chief Justice Ritchie held that the notice was insufficient because it conveyed no intimation of an intention to bring an action, but he also held that the notice of action should be pleaded, and that, as it was not pleaded, the plaintiff could recover. Mr. Justice Strong held that the notice of action was insufficient, and supported it by citing Union Steamship Co. v. Melbourne Harbour Commissioners, without drawing the distinction between the requirements of the statutes in the two cases. The case, however, was decided by a majority of the Court in favour of the plaintiff, on the ground that notice of action was not necessary. The notice, which is set out in the report, does not give any locality where the accident occurred, it simply says "in consequence of a

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defective sidewalk in your city." If time and place or either of them must be reasonably set out, then beyond any question that notice of action was bad.

If St. John v. Christie is a decision as to the requirements of a notice of action, then I must hold that the notice in this case is not sufficient. It seems to me I might treat the remarks on notice as but the remarks of dissenting Judges, and that I am not bound by this view of the law. I think also I am not bound by the obiter remarks of Mr. Justice Denman above referred to.

The Manitoba statute requiring the notice in this case was passed long after the other statutes requiring notice above referred to, and very probably the legislature desired to depart from the strictness required by similar statutes, and hence the very simple language used.

Our statute only requires notice of "any such claim;" such claim is the right to damages sustained by any person by reason of the default of the corporation in keeping the highway in repair.

The plaintiff then must notify the defendant that he has a claim for damages which he has sustained because of the default of the defendants in keeping the highways of the city in repair. With what particulars must he embellish this skeleton? The notice states the street, the side of it, and a limit within 400 feet, which the plaintiff alleges was out of repair, that this non-repair was a default of the city, that because of this default of the city the plaintiff sustained injuries, and that she will enforce this claim by suit. The plaintiff did not say in the notice that a broken plank caused her to fall and injure her hand, she simply said she would sue to recover "for injuries sustained by me through the omission and default of" the defendants. The notice does not give any date for the accident.

If an action had been brought under the old system of pleading at common law for this claim, it would not have been necessary to allege either time or place of the accident. See Bullen & Leake, p. 377; Chitty Jr., p. 575. And I know of no rule which requires such allegations in the present system of pleading. I think the notice is sufficient.

PERDUE, J.A.:—This is an action for damages against the city of Winnipeg for injuries alleged to have been caused

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to plaintiff by a fall occasioned by stepping on a broken plank in a sidewalk on the east side of Main street in that city. At the trial before Richards, J., judgment was entered in favour of plaintiff. From that judgment defendants appeal.

It was intimated at the argument of the appeal that the Court was prepared to uphold the decision of the trial Judge if the notice of claim or action given to the city by plaintiff was sufficient under the statute. Upon that ground alone was judgment reserved.

Section 722 of the Winnipeg charter, 1 & 2 Edw. VII. ch. 77, makes the city liable for damages sustained by any person by reason of the default of the city to keep in repair streets, highways, etc., and every part thereof. It is provided in sub-sec. (b) of that section as follows:—

"Provided further that notice of any such claim or action must be served upon the clerk within one month after the happening of the alleged negligence, and any action brought for damages in connection therewith shall be commenced within three months from the receiving of such notice."

Notice was served on the city clerk at the instance of plaintiff within one month after the happening of the accident. This notice was in the words set out in the statement above.

The sufficiency of the notice was objected to upon several grounds, the principal ones being, (1) that the date of the accident was not given, (2) that the notice did not sufficiently set out the location where the accident occurred, (3) that it did not set out the negligence complained of, or (4) the injury sustained.

Section 722 of the Winnipeg charter is the same as sec. 667 of the Municipal Act.

The portion of the section which declares that a municipal corporation shall be civily responsible for damages caused by default in repairing a highway, was first enacted in the Municipal Act of 1886, 49 Vict. ch. 52, sec. 387; but that enactment contained no provision requiring notice to be given. The provision in regard to serving notice is first found in the Municipal Act of 1890, 53 Vict. ch. 51,

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sec. 412. The provisions of the last mentioned statute were largely copied from the Ontario Act, but in 1890 no notice of such a cause of action was required in Ontario: see McCarthy v. Township of Vespra, 16 P. R. 416. As pointed out in Curle v. City of Brandon, 15 Man. L. R. 122, the statute is unfortunately worded in using the word "negligence" in sub-sec. (*b*). If the sub-section were strictly construed, and notice required to be given within a month after a municipality had become guilty of negligence in the repair of a street, no action could be brought against the corporation in respect of an accident which occurred more than one month after the negligence took place.

In order to preserve the effect of the main part of the section, the word "negligence" in the proviso, sub-sec. (*b*), must be construed, in a case of continuing default, as referring to a negligence which recurs from day to day during its continuance, and which constitutes an act of negligence every day until the repair is made. In Curle v. City of Brandon, to which reference is made above, it was held that notice given within a month of the occurrence of the accident was sufficient in a case of continuing negligence.

It is to be observed that the words of sub-sec. (*b*) simply require the service of "notice of any such claim or action." It does not state how the notice shall be worded, or what necessary elements it shall contain. The object of requiring such a notice is to enable the officers of the municipality to investigate the claim and to tender amends, and possibly another object may be to call their attention to the dangerous state of the highway in question. All that is essential in the notice, therefore, is that it should be sufficiently clear and explicit to shew the ground of complaint—the cause of action.

The first objection to the notice is that the date of the accident was not given. To this it may be answered that the statute does not require in express terms that a date shall be given, and that the municipality must know that either the accident happened within a month prior to the receipt of the notice, or, if not, that the party complaining has lost his cause of action by reason of the lapse of a month without notice being given. If the notice is exact enough to disclose a substantial claim or cause of action

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on the part of the person complaining, the officers of the municipality could then make their investigation as to the validity of the claim, and could as easily ascertain the date by inquiry as they could any other material circumstance.

The objection to the description of the location was that it was too wide, that the notice complained of the condition of the sidewalk extending past two blocks as being the cause of the injury, and that it should at least have stated the block where the accident happened. The actual place where the plaintiff met her injury appears to have been on the sidewalk upon the east side of Main street a little south of Polson avenue. It would have been more accurate to have described it as the portion of the sidewalk lying between Polson avenue and Atlantic avenue, the latter being the next street south of Polson avenue. To refer to it as lying between Polson and Bannerman avenues simply included the width of two narrow blocks instead of one. Although the description was wider than it might have been, it can scarcely be said that the notice did not mention the locality in respect of which the complaint was made.

To charge the city with omission and default in failing to keep a sidewalk in repair, would, it appears to me, sufficiently notify them that the plaintiff complained of negligence in that respect. "Default" is the word used in the main part of the section. The use of the word "negligence" in the notice would not appear to be necessary if the same meaning is conveyed by other words.

Another objection to the notice was that the nature of the injury was not set out, that it was not stated whether the plaintiff made claim for physical injuries sustained by her, or for injuries caused to her property. The natural meaning of the words "injuries sustained by her," when used in connection with an allegation of omission to keep a sidewalk in repair, should sufficiently convey to the minds of the civic officials the information that the plaintiff was asserting that she had sustained bodily hurt by reason of the defective sidewalk.

For many years prior to the first introduction into our Municipal Acts of the provision requiring the service of a notice of claim before commencing action against the

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corporation, the general tendency of judicial decisions had been towards construing statutory notices of action in a liberal spirit.

Jones v. Bird, 5 B. & Ald. 837, decided in 1822, was an action against contractors engaged in constructing sewers. The local Act required a notice in writing to be given specifying the cause of action before any suit was brought for anything done under the Act. The objection was taken that the notice did not sufficiently state the cause of action. Abbott, C.J., said: "I think the notice is sufficient, and that it ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of the complaint, but not of the mode or manner in which the injury has been sustained." Bayley, J., said: "It (the notice) is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises and see what the ground of complaint is."

Jones v. Bird is cited in all subsequent decisions dealing with the sufficiency of notices of action, and the principles there laid down seem to have been generally adopted. I would refer to the following cases: Jones v. Nicholls, 13 M. & W. 361; Smith v. West Derby Local Board, 3 C. P. D. 423; Madden v. Kensington Vestry, [1892] 1 Q. B. 614; Union Steamship Co. v. Melbourne Harbour Commissioners, 9 App. Cas. at p. 368.

All these cases enunciate the same principle, that notices of action should not be construed with extreme strictness, that it is sufficient, as a general rule, if the notice fairly and reasonably discloses the ground of complaint relied on by the plaintiff. The same rule has been followed in all the later Ontario cases. See Langford v. Kirkpatrick, 2 A. R. 513; Bond v. Conmee, 16 A. R. 398; Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. 560, 1 O. W. R. 612.

It may be surmised that the framer of sub-sec. (*b*) was aware of the trend of judicial decisions as above indicated, and that, although persuaded that a municipality should have some notice of action, he considered it his duty, in deference to the liberal construction placed by the Courts upon such notices, to frame the provision in the widest

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and most general terms and to provide simply for the giving of a notice of claim or action. The statute does not in words call for any degree of clearness or exactitude in the form or contents of the notice. It appears to me that if the notice contains facts and details sufficient to reasonably inform the officers of the corporation of the nature of the claim and who is bringing it, so as to enable them to make investigation, it would be sufficient.

I think the appeal should be dismissed with costs.

PHIPPEN, J.A.:—As the Chief Justice has written a very full judgment, with which I agree, it is unnecessary to express my views at length.

The trial Judge has found as a fact that sidewalks of the age of the one in question are liable to contain concealed defects from interior decay rendering them dangerous, and that no proper inspection to discover such defects was made by the city. There is evidence to support this finding, such, I think, as prevents our disturbing his judgment on this point. While large, I do not think we can interfere with the amount of damages awarded.

The only question upon which, on the argument of the appeal, I had any doubt was as to the sufficiency of the notice. If the statute requires anything like the particularity of a statement of claim, the notice in this case is undoubtedly defective and cannot be upheld. Bearing in mind, however, the very general language of the Act, "notice of the claim or action," and that this statute was probably founded on the corresponding legislation of the older provinces, considering how much broader is the language of our Act than that of the previous enactments, and looking at the generous canons of construction adopted by the Courts in interpreting similar legislation, I am, with hesitation, of opinion that the notice is sufficient, upon the grounds so fully and clearly discussed by the Chief Justice and Mr. Justice Perdue.

Appeal dismissed with costs.

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MANITOBA.

PHIPPEN, J.A. DECEMBER 21ST, 1906.

TRIAL.

SLINGSBY MANUFACTURING CO. v. GELLER.

Partnership—Special Partner—Declaration of Partnership—Alleged False Statement—Contribution of Special Partner to Capital — Date of Declaration — Name of Firm—Recording Declaration at Large—Non-compliance with Partnership Act—Defects in Creation of Limited Partnership—Effect of—Special Partner Becoming General Partner — Liability for Debts of Firm — Construction of Statute.

Action on a promissory note for $1,504.15 made by, and a bill of exchange for $288.50 accepted by, defendants the Winnipeg Shirt and Overall Manufacturing Co., which instruments were held by plaintiffs unpaid. Plaintiffs sought to hold defendants George Geller, Morris Haid, and Jacob Rosenthal liable as partners constituting the defendant partnership or company.

Rosenthal defended on the ground that his partnership was a limited one under secs. 61 to 81, inclusive, of the Partnership Act, R. S. M. 1902 ch. 129. No defence had been entered on behalf of the other defendants, against whom interlocutory judgment had been signed.

J. D. Cameron and H. Phillips, for plaintiffs, contended that the limited partnership alleged by defendant Rosenthal was irregularly created, and he was liable as a general partner for all the debts of the firm.

C. W. Bradshaw and A. M. S. Ross, for defendant Rosenthal.

PHIPPEN, J.A.:—The partnership was formed under the following declaration:—

"We, the undersigned, do hereby certify that we have entered into co-partnership under the style and firm of the Winnipeg Shirt and Overall Manufacturing Company, as manufacturers of overalls, shirts, and any other articles which

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they desire to manufacture, and also as general merchants and commission merchants, which firm consists of George Geller, usually residing at the city of Winnipeg, in the province of Manitoba, merchant, and Morris Haid, usually residing at the city of Winnipeg, in the province of Manitoba, merchant, as general partners, and Jacob Rosenthal, residing at the city of Winnipeg, in the province of Manitoba, merchant, as a special partner, the said Jacob Rosenthal having contributed $4,000 to the capital stock of the said partnership, which said co-partnership commences on the 20th day of February, 1905, and terminates on the 20th day of February, 1908."

This was dated 14th February, 1905, and signed by the three persons named.

This declaration was filed with the prothonotary of the Court of King's Bench on 17th February, 1905. It was, following the practice which has prevailed in the office for the past 20 years, recorded by being entered in a book kept for the purpose of recording partnership articles, in which were set forth the date of the declaration, the names of the partners, the name under which the business was to be carried on, and some further particulars, but the document itself has not been recorded at length.

Plaintiffs contend that the evidence shews that the $4,000 referred to in the declaration had not been contributed in cash, as stated therein, whereby the declaration contained a false statement, rendering the defendant Rosenthal liable as a general partner pursuant to sec. 69 of the Partnership Act.

The evidence on this point is shortly as follows:—The defendant Rosenthal was examined for discovery prior to the trial, and portions of his evidence were put in at the trial as part of the plaintiffs' case. His story, as I understand it, is that he contributed the $4,000 mentioned in the certificate in cash, although he would not state the exact dates of payment. Being pressed, he admitted he had from time to time lent money to the firm prior to his becoming interested therein, and that it was possible a small portion of the $4,000, some $200 or $300, had been paid by the taking over by the firm of a previous advance.

At the trial the defendant Geller, who appears to have been the active manager of the firm, stated that Rosenthal

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had contributed the $4,000 in cash. He also at first was somewhat uncertain when pressed whether or not a small amount had not been paid by the taking over of a credit in the manner suggested by Rosenthal. On referring to the firm's books, however, he stated positively that Rosenthal had paid the following amounts:—Feb. 13th, '05, $1,000; Feb. 17th, '05, $2,200; and Feb. 17th or 18th, '05 (the entry being under date of 18th), $800.

The witness's memory on this point was corroborated by the production of the original cheques covering the $1,000 and $800 items respectively, both of which cheques bore the bank stamps shewing that they had been drawn by Rosenthal on the Bank of Hamilton and accepted and paid by that bank to the Imperial Bank of Canada, with which bank the defendant company then kept an account. The $2,200 item was substantiated by the production from the Imperial Bank of the original deposit receipt shewing that $2,200 odd had been deposited with that bank to the credit of the firm on the 17th February, 1905, and by the testimony of a clerk in the bank, who stated that this amount had on the day aforesaid been received by the bank and passed to the credit of the defendant company.

The declaration filed on the 17th February states that the sum of $4,000 has been contributed. This in itself is some evidence of the fact stated, and, coupled with the testimony of Geller and the bank clerk, Mr. Skiffington, together with the production of the cheques and deposit receipt, is, I think, ample evidence that $4,000 was contributed by Rosenthal to the firm for the purposes of his special partnership.

The books shew $800 to have been paid on the 18th February. This, if correct, would be one day after the filing of the partnership declaration. Mr. Geller, however, states that he thinks the date in the book should be the 17th, the entry having been made the day following the receipt of the money. This is borne out by the fact that the cheque for the amount was, according to Mr. Skiffington's testimony, and according to the stamp on the back of the cheque, deposited in the Imperial Bank of Canada on 17th February. I hold on all of the evidence that the $4,000 referred to in the declaration was paid into and received by the firm on or before 17th February, and that thereafter on that date the declaration of partnership was filed.

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Plaintiffs' counsel contends that the declaration contains an untrue statement, in that it is dated 14th February, 1905, whereas the $4,000 was not completely paid before the 17th of that month. There is no satisfactory evidence as to the date of the execution of the declaration. Apparently from one portion of Mr. Rosenthal's evidence matters were dragging for a day or two after the solicitor was instructed to prepare the papers. The solicitor suggests that the declaration was not signed until the 17th, but I gathered from his evidence that this was an inference from the fact that the document could not be properly signed until that date, rather than testimony based upon memory.

Apparently from Mr. Geller's evidence and from the action of the solicitor in withholding the filing of the declaration until the money had been actually paid, the parties were aware that payment was necessary before the declaration was completed. The declaration itself contains the positive statement that the money had been paid. The date is typewritten apparently at the time the declaration was run off by the stenographer, and necessarily before execution. I do not think I could assume, in the face of these facts, merely because the document bears date the 14th, that the statement is untrue, but should rather hold that the document was executed on the 17th, after the money had been paid and when the statement could be truly made. If so, it merely becomes a question of whether or not an erroneous date in such a declaration involves the very serious results imposed by sec. 69 of the Act. I do not think an error in the date by itself constitutes a false statement in the declaration within the meaning of the Act. I find, therefore, that there is no false statement in the declaration within the meaning of the statute, and I refuse to give force to this objection.

Section 72 of the Act is as follows: "The business of the partnership shall be conducted under a name or firm in which the names of the general partners, or some or one of them, only shall be used; and if the name of any special partner be used in such firm with his privity, he shall be deemed a general partner."

The objection is taken that the name under which this partnership was carrying on business was not that of one, or more than one, of the general partners only. This objection is sound.

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Sections 68 and 69 of the Act are as follows:—

"68. Such certificate (referring to the partnership declaration) shall be recorded at large in a book to be kept for that purpose in each such office, which book shall be open for public inspection."

"69. No such partnership shall be deemed to have been formed until a certificate has been made, certified, filed, and recorded as above directed; and if any false statement be made in such certificate, all the persons interested in the partnership shall be liable for all the engagements thereof as general partners."

Plaintiffs' counsel argues that recording at large means being entered at length in a book kept pursuant to the requirements of the statutes, and that under sec. 69, until such document has been "recorded as above directed," the partnership shall not be deemed to have been formed. This contention I uphold. By reason of these two defects in the creation of the limited partnership it is contended that defendant Rosenthal has become a general partner and as such liable for the debts of the firm..

A partnership may be created in one of three ways: (1) by statute; (2) by contract, either (a) expressed or (b) (implied; or (3) the defendant may be estopped from denying, for certain purposes, the existence of a partnership. No such liability as the plaintiff urges is directly imposed by statute as a penalty for either of the found defects. On the other hand, the wording of the Act is strongly against such construction. Section 69 states that until the certificate has been recorded, as above mentioned, no partnership shall be deemed to have been formed. The same section then provides that if any false statement be made in the certificate, "all persons interested in the partnership shall be liable for all the engagements thereof as general partners." To extend this penalty to the improper recording of the certificate would be to assume the functions of the legislature.

Again sec. 72 requires the partnership business to be conducted in a name or firm in which the names of the general partners or some of them only shall be used, "and if the name of any special partner be used with his privity, he shall be deemed a general partner." No penalty is imposed by statute for the attempted formation of a firm or the carrying on of the business in a firm name not that of

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one or more of the general partners, but which, as in this case, does not contain the name of the special partner. The statute imposes a specific liability for the use of the special partner's name with his privity or consent, and this penalty plaintiffs seek to apply for the use of a name unconnected with that of defendant, a contention which, if successful, would be an extension of the statutory enactment. It seems to me clear that the Act does not itself impose any special liability upon the special partner for such non-compliance as I find has occurred in this case. On the other hand, on the principle of "expressio unius," it is strongly against any such construction.

Has the defendant Rosenthal, apart from the Act, made himself liable as a general partner by contract express or implied? The only express contract entered into between the parties is contained in the declaration filed. This clearly was not a contract for a general partnership. General and special partnerships are entirely separate and distinct in nature and effect. The essential element—agency to bind his co-partners—is entirely lacking in the case of a special partner, likewise the individual liability of the members of the firm is wanting in such cases. There may be other differences, but these are sufficient to shew how distinct these partnerships are.

The defendants intended to enter into a special partnership. It was owing to an honest mistake on their part that the intervention of the statute prevented the accomplishment of their object. I fail to see how a contract for a special partnership becoming inoperative by reason of non-compliance with a statutory requirement can, apart from legislation, be turned into and thereby become a contract for a general partnership—a contract which the parties had no intention of making.

Under such circumstances, however, it would be very easy for the Court to presume a new contract of general partnership, if it appeared that there was any subsequent action by defendants consistent only with the existence of an actual partnership between them. In other words, if plaintiffs had established that defendants had done something which they could not have done other than as partners, the Court would readily presume a general partnership agreement. Nothing of that kind, however, appears in this case. So far as the records shews, nothing happened beyond

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the payment of the $4,000, and the execution of the agreement. The evidence does disclose that the business was in existence before Rosenthal was thought of as a special partner, and that on his entry into the firm no change took place in the firm's name. Nothing apparently happened except the execution of the agreement and the contribution of the $4,000, as referred to therein, until some months later, when an assignment was executed to the official assignee for the general benefit of the creditors. No liability on the ground of estoppel is sugggested by plaintiffs. This was not the case of the commencement of a new business when some sort of a partnership between all the parties must be held. Nothing appears to have been done inconsistent with the continuance of the old firm in which Rosenthal attempted to buy a particular kind of interest, his attempt being frustrated by non-compliance with the statute.

Plaintiffs' counsel referred to a number of cases as supporting his contention that the result of failure to comply with any condition of the Act was a general partnership involving the special partner in full liability. While the requirements of the statute must be strictly adhered to, and while the Court has no authority to alter or vary any penalty which the statute prescribes for breach of any of its conditions, I do not think it should be astute to import penalties to which the statute does not refer.

I have examined carefully the cases cited by Mr. Cameron, but do not find them at all satisfactory in supporting his contention.

Patterson v. Holland, 7 Gr. 1, turns on the fact that the Act in that case provided that on failure to comply with its terms the partnership should be deemed a general one. In other words, the penalty was there imposed by the Act itself.

Whittemore v. Macdonell, 6 C. P. 547, held the declaration filed false, thereby involving the same statutory result as is provided by sec. 69 of our Act.

Watts v. Taft, 16 U. C. R. 256, Haggarty v. Foster, 103 Mass. 17, Fourth Street National Bank v. Whittaker, 107 Penn. St. Rep. 297, and Durant v. Abendroth, 69 N. Y. 148, all turn on exactly the same point as Whittemore v. Macdonell.

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In Andrews v. Schott, 10 Penn. St. Rep. 407, the defect was in the use of general words in the name of the company, contrary to the express provisions of the Act. The corresponding section in the American Act differed somewhat from sec. 72 of our statute, and the special partner was held to become a general partner by the application of the penalty clause at the end of the section, the Court holding that the penalty clause applied to the whole section, and not merely to cases where the name of the special partner had been used as part of the firm name with his privity. The difference in the wording between the American Act and ours might be sufficient to justify this holding, but I cannot bring myself to apply the penalty in sec. 72 to the case where the name of the special partner is used as part of the firm name without his privity or consent, or where an improper name is used not involving the name of the special partner.

In Ward v. Newell, 42 Barb. 482, it was held (Sutherland, J., dissenting), that the use of an improper name for partnership purposes charged the special partner with payment of the debts. This part of the decision, however, was entirely obiter, and appears to have been given as following Madison v. Gould, 5 Hill 309. This last case is entirely distinguishable, as there the defendants appear to have done things inconsistent with any other condition than that a partnership in fact existed, justifying the Court, under the principle discussed above, in presuming a later partnership contract.

In Benedict v. Van Allen, 17 U. C. R. 234, the judgment is most unsatisfactory. An application for a new trial was refused because the facts proved on the original trial shewed the applicant to be a general partner according to the express provisions of the Act. If by this the Court meant that, in their opinion, the penalty was imposed by statute, the decision in that case is not contrary to my holding in this.

The class of cases which most nearly approaches the present is well illustrated by Sheble v. Strong, 128 Penn. St. Rep. 315. There the statute required, where capital was contributed by way of plant, that certain particulars should be given in and certain valuations attached to the declaration of partnership. Failure so to do was held to constitute a general partnership between all members of the firm. In that

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case, however, there were acts of partnership which could not be reconciled with existing conditions without assuming a partnership in fact between all the parties. The defendants not being entitled to the protection of the Act relating to special partners by reason of their failure to comply therewith, the Court assumed the existing partnership to be general, and with this line of law I think no one can properly differ.

If in this case I could find any act consistent only with partnership among all the defendants, I would unhesitatingly hold the defendant Rosenthal a general partner and liable as such. The present case, however, appears to be somewhat unique in its facts, so far at least as comparison with reported cases shews. Here the defendant Rosenthal attempted simply to buy into an existing firm. There is no evidence of any alteration in the name under which or method in which the old firm had done its business. So far as the evidence discloses, no such change occurred, and nothing happened except the attempted purchase by the defendant, which was rendered abortive by non-compliance with the terms of the Partnership Act.

Under these circumstances, I must hold that Rosenthal was never a member of the defendant firm, and such being the case, and there being no statutory penalty for non-compliance with the Act found, it follows that he is not liable.

This action will, therefore, be dismissed as against this defendant with costs.

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YUKON TERRITORY.

MACAULAY, J. NOVEMBER 23RD, 1906.

CHAMBERS.

HARRIGAN v. KLONDIKE MINES R. W. CO.

Arbitration and Award—Motion to Set aside Award—Misconduct of Arbitrators—Gross Undervaluation of Mining Claim in Question—Interested Motives Alleged against Arbitrators—Evidence—Disproof of Charges—Railway Act—Payment out of Court.

Application by plaintiffs, similar to that in Morley v. Klondike Mines R. W. Co., ante 109, to set aside the award of George Coffee and Edward Simpson, a majority of the arbitrators, on the ground that the award is unjust, improper, unreasonable, and grossly and scandalously inadequate, and that the same was made without regard to the evidence, and on the ground that the majority of arbitrators acted unfairly, improperly, and not as fair or just arbitrators between the parties on such arbitration, or in making such award.

George Black, for plaintiffs.

C. W. C. Tabor, for defendants.

MACAULAY, J.:—The same arbitrators were appointed in this case as were appointed in the Morley case, and the same conclusions arrived at as in that case, the arbitrators Coffee and Simpson awarding plaintiffs $200, and the arbitrator Cathcart awarding plaintiffs $3,000.

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Defendants submitted no evidence, and plaintiffs' evidence was similar to the evidence submitted in the Morley case, but not so strong in favour of plaintiffs, in my opinion, as the evidence was in the Morley case, plaintiffs saying that they believe they actually suffered damages to the extent of $3,000, but admit that in the autumn of 1904 they bought a three-quarters interest in this claim for $100; that the claim had been worked more or less since 1898 and was considerably "gophered;" that they allowed the claim to lapse in 1905, because there was not sufficient representation work done upon it; but they later state that they believed they had done sufficient work, although they did not know it at the time. They afterwards relocated the property. They assert that they could only work it profitably by ground sluicing or hydraulicing, but that they made no application for water rights, although most of the water was taken up by other persons. They did come to Dawson to see Mr. Beaudette, the government mining engineer, in regard to water rights, but as he was out of town they did not bother afterwards about securing their rights.

In my opinion, the evidence for plaintiffs is much weaker in this case than it was in the Morley case. On the application to set aside the award, practically the same material is used before me as was used before me in the application in the Morley case, or similar material. No greater reasons are shewn why this award should be set aside than were in the Morley case, and, having arrived at the conclusion in the Morley case that on the material before me I could not set aside the award, it is impossible for me to consider favourably to plaintiffs this application, and for reasons similar to those I gave in my judgment in the Morley case I must dismiss this application with costs.

At the conclusion of the hearing of this application before me an application was also made by Mr. Tabor on behalf of defendants for payment out of the moneys deposited into Court under the order of Mr. Justice Craig referring this matter to arbitration. As in the Morley case, I reserved my decision until the disposition of the application to set aside the award. That application having been refused, the order will now go for payment out of the moneys in this case, as requested.

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MANITOBA.

MACDONALD, J. DECEMBER 31ST, 1906.

TRIAL.

BOGLE v. KOOTENAY VALLEY CO.

Company — Shareholder — Agreement to Take Shares in Exchange for Profit on Lands Acquired by Company—Status of Shareholder—Action to Establish.

Plaintiff, asserting himself to be the owner of 4 shares of the value of $1,000 each in defendant company, brought this action to compel the company to issue and deliver to him a certificate shewing him to be entitled to the shares, or for a declaration of his right thereto.

Defendant company denied plaintiff's right to the shares.

P. C. Locke, for plaintiff.

A. Haggart, K.C., J. T. Huggard, and W. L. McLaws, for defendants.

MACDONALD, J.:—Plaintiff was one of a syndicate promoted for the purpose of acquiring and holding lands by purchase, grant, lease, exchange, or otherwise.

The syndicate purchased from the Kaslo and Slocan Railway Company lot 812, group 1, West Kootenay district, comprising 8,750 acres, and the agreement for the sale and purchase thereof was made between the company and W. F. Teetzel and Thomas Wellband, and is filed as exhibit 6.

Prior to the purchase above mentioned, an agreement was entered into between Teetzel and Wellband that a syndicate should be formed for the purpose of purchasing the land above described, and to take over the lands and relieve the parties from covenants as early as possible.

The syndicate was formed, and plaintiff was a member of it, and took an active part in securing the lands in question. Subsequently an application was made for incorporation, and a charter issued, by which the defendant company was created, and of which the plaintiff was a director, and the

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lands in question were turned over to the company at an advance of $10,000, the individual members of the syndicate agreeing to take stock in the company for the profit thus made by them. Stock certificates were made out, and on 1st June, 1905, one issued in the name of plaintiff, certifying him to be entitled to 4 shares, but the certificate was held by the company. Calls were made upon the shareholders, to which plaintiff did not respond.

Plaintiff made a demand upon the defendant company for a certificate shewing his interest in the company, and states that he was always ready to pay the calls made upon his stock, if the payments were properly acknowledged and certificate delivered him. The company refused to acknowledge him as a shareholder, and made efforts to deprive him of his rights and interest in the company.

The defendant company acted arbitrarily towards plaintiff by refusing to recognize him as a shareholder, and by the effort to deprive him of his vested rights.

I find that plaintiff was on 1st June, 1905, a shareholder in the defendant company to the extent of $4,000 with 25 per cent. paid up, and is now entitled to be declared entitled to all the benefits of a shareholder to such an extent, subject to all obligations legally imposed upon him as such shareholder.

There will be judgment for plaintiff accordingly, together with costs.

MANITOBA.

MACDONALD, J. JANUARY 11TH, 1907.

CHAMBERS.

RE CODVILLE.

Municipal Corporations — Closing Street—Land Injuriously Affected—Right to Compensation—Contract for Sale of Land Affected—Reservation of Right to Compensation—Status of Applicant.

Application by Edith A. C. Codville under the charter of the city of Winnipeg and by-law No. 2790 for an order for

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compensation for depreciation in value of land in the city by reason of the closing of a street.

C. P. Wilson, for the applicant.

I. Campbell, K.C., for the city corporation.

J. A. M. Aikins, K.C., for the Canadian Pacific Railway Company.

MACDONALD, J.:—The applicant, Mrs. Edith A. C. Codville, was, on or about 26th November, 1903, the owner of lots 6, 7, and 8 in block B as shewn on a plan of subdivision of a portion of lot 35 of the parish of St. John, according to the Dominion government survey of that parish.

On 26th November Mrs. Codville agreed to sell and convey the lands to one John D. McArthur.

For some time prior to the agreement of sale referred to, the Canadian Pacific Railway Company, with the consent of the city of Winnipeg, contemplated closing up certain localities of certain streets in the said city, one of which was King street, where it crossed Point Douglas avenue, which it was proposed to close at that point.

By reason of the contemplated change the property of Mrs. Codville above described depreciated in value, and at the time of the sale to Mr. McArthur Mrs. Codville reserved to herself the right to the compensation which would accrue should the contemplated change take effect.

An agreement in writing was executed, fully reciting Mrs. Codville's interest.

It was contended on behalf of the city of Winnipeg and the Canadian Pacific Railway Company that Mrs. Codville was not entitled to the compensation arising by reason of the property being injuriously affected by the closing of the street, at the point mentioned, because she had parted with the property, and had no further interest in it.

I find that under the agreement between Mrs. Codville and Mr. McArthur, at the time of the sale, the former reserved such an interest in the property as entitles her to the compensation in damages for the depreciation in value thereof.

Costs to the applicant.

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MANITOBA.

MATHERS, J. JANUARY 15TH, 1907.

SINGLE JUDGE'S COURT.

SLATER v. RYAN.

Trade Mark — Infringement — Injunction — Use of Defendant's Own Name—Absence of Fraud—Passing-off.

Motion for an injunction restraining defendant from infringing plaintiffs' trade mark.

A. E. Hoskin, for plaintiffs.

J. A. M. Aikins, K.C., for defendant.

MATHERS, J.:—The plaintiff company have, since 1899, manufactured and sold boots and shoes under the names "Slater" shoes or "Slater" boots and shoes. For a number of years prior to that date the business had been carried on by its founder, George T. Slater, and the company after his death acquired the business and goodwill thereof from his executors. In 1895 the plaintiff company obtained a specific trade mark to be applied to boots and shoes of all kinds, which consists of a representation of a wooden slate frame with the words "The Slater Shoe" inscribed in the slate. The company carry on the business of wholesale manufacturers of boots and shoes and have largely advertised their goods throughout Canada as "Slater Shoes," and have, no doubt, a large and extensive business connection in Winnipeg and throughout Manitoba.

In the city of Winnipeg there is a store called "The Slater Shoe Store," owned and carried on by a man named Stark, where the boots and shoes manufactured by the plaintiff company are exclusively sold.

For several years prior to September, 1904, the defendant, who is a boot and shoe merchant carrying on business in Winnipeg, was the agent of the plaintiffs for the sale of their goods. About that time the relationship was terminated.

Since 1900 George A. Slater has carried on the business of wholesale manufacturer of boots and shoes at Maisonneuve, in the district of Montreal, and he, also, has extensively ad-

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vertised his goods throughout the Dominion. He says that as far back as 1902 he has advertised his goods as "The Geo. A. Slater Shoe," and also as the "Invictus Shoe" manufactured by Geo. A. Slater.

Upon the termination of his relations with the plaintiffs, as their agent, the defendant began and has ever since continued to deal in the goods of Geo. A. Slater.

During the latter part of 1904 the defendant inserted advertisements in the Winnipeg newspapers to which the plaintiffs took exception, and which the defendant promptly undertook not to repeat. The first advertised "George A. Slater Shoes" at $3.50 and added "Why pay $4 elsewhere for shoes of a similar name, when our price for George A. Slater shoes," etc. The next advertisement complained of consisted of a boot in a slate frame and underneath the boot the words "School shoes." These are not the advertisements now sought to be restrained, and need not, therefore, be discussed, but I may say, in passing, that the use of the slate frame was probably an infringement of the plaintiffs' specific trade mark, but I accept the explanation of the defendant that its use was not intended to have any relation to the plaintiffs' shoes, but was used to illustrate shoes for school children. However this may be, the slate frame has not again been used by the defendant.

The advertisement complained of appeared in the Winnipeg Free Press on the 2nd and 3rd April last, and consists of the cut of a shoe, underneath which in display type are the words, "We sell the celebrated Geo. A. Slater Invictus Shoes for men." The words "Geo. A." and "Invictus" are in considerably smaller type than the words "Slater" and "Shoes," but are still quite prominent and easily to be seen. The advertisement only appeared on the two days named, and this action was begun on 19th April for an injunction restraining the defendant from advertising, or offering for sale, or selling, boots and shoes, not made by the plaintiffs, as "Slater Shoes" or "Slater goods," or by any other word or words of which the word "Slater" forms a part, or under any other form of words under which the public may be led to believe that the shoes handled by the defendant not of the plaintiffs' make are made by the plaintiffs.

Samples of the shoes manufactured by George A. Slater and sold by the defendant and of those manufactured by the plaintiffs were produced, and from the markings upon them

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it would be impossible for any person with ordinary powers of observation to mistake the one for the other. Those of the former have his trade mark stamped upon the sole, consisting of the words "The Invictus Shoe, Geo. A. Slater, Maker," and the pull strap has also the words "The Invictus, Geo. A. Slater, Maker." The pull straps of the plaintiffs' shoes are of a different colour, and on the sole is impressed the slate frame on which are the words "Geo. T. Slater & Sons, The Slater $4.00 Shoe, Manufacturers, Montreal," and inside the top of one shoe of each pair a similar mark is impressed. It is also said that the shapes and styles are different, but that fact could not be so apparent to an ordinary observer. From an examination of the shoes themselves I am of opinion that reasonable precautions have been taken by George A. Slater to prevent the public who buy his shoes from being deceived into the belief that they are buying those of the plaintiffs. The question is, therefore, narrowed down to whether or not the defendant had a right to advertise as he did, on 2nd and 3rd April last.

The law on the point is fairly well settled, and the only difficulty that arises consists in its application to the facts in a particular case. The first proposition that I think settled by authority is, that any person has a perfect right to use his own name in describing the goods he offers for sale, notwithstanding the fact that some person else may be selling the same kind of goods under the same name, provided he does so honestly, and in such a way as not to falsely represent the goods he sells as those of the other dealer. This was decided in the leading case of Burgess v. Burgess, 3 DeG. M. & G. 896, in 1853, a case that has been followed ever since that time. In that case the defendant's father had for over half a century manufactured and sold a sauce as "Burgess's Essence of Anchovies." For thirty years the defendant had been in the plaintiff's employ. Immediately after quitting the plaintiff's employment the defendant opened a shop and warehouse and at once began to manufacture a sauce which he offered for sale as "Burgess's Essence of Anchovies." The Court refused to restrain him from doing so, there being no circumstances of fraud. The following statement of the law by Lord Justice Turner in that case has been repeatedly quoted with approval since: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent

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the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff."

A number of cases were cited in which a party was restrained from using his own name as part of the description of the articles sold in the manner it was being used. A particular review of these authorities would serve no useful purpose, but I have read them all, and I believe I am stating their effect correctly when I say that in all of them in which an injunction was granted it was found, as a fact, that the defendant was making a fraudulent use of his name for the purpose of appropriating the trade of his rival, and in every case where fraud or unfair dealing was not found the injunction was refused. Of the latter class of cases I might mention Turton v. Turton, 42 Ch. D. 128.

The same principle applies where a person simply describes truthfully the goods he sells. That I think appears clearly from Reddaway v. Banham, [1896] A. C. 199, the case chiefly relied upon by the plaintiff. The plaintiff had for years sold a belting as "Camel Hair Belting." The defendant began too to sell a belting made of the yarn of camel hair and stamped it "Camel Hair Belting." The judgment turned entirely upon the finding of the jury, which was that Camel Hair Belting meant belting made by the plaintiff and did not mean belting of a particular kind without reference to any particular maker. Certain correspondence was put in evidence which shewed clearly that the defendant marked his belting in the way he did for the purpose of taking trade from the plaintiff. The Lord Chancellor refers to this correspondence and intimates that, but for it, his judgment would be against the plaintiff. Lord Macnaghten bases his judgment on the jury's finding, and Lord Morris found himself coerced by the verdict of the jury.

There is another class of cases where fraud need not be shewn, but where the mere use of the name raises a presumption of fraud. I refer to cases where a fancy name has acquired a special value as applied to any particular commodity, or as attached to any particular business. Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal, 32 S. C. R. 315, was such a case. The plaintiffs, with headquarters at Boston, had gained a reputation in Canada for their goods as

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"Boston Rubber Shoes." The defendants were incorporated in Quebec, and began the same line of business. In delivering the judgment of the Court in favour of an injunction Sir Louis Davies observed that there was no legitimate reason why the word "Boston" should be used as part of the corporate name of a company in Quebec, and, whether or not the defendants so intended it, he had no doubt that its use would deceive the public.

Has the defendant in this case accurately and truthfully described the goods he sells? They are described in the advertisement as the "George A. Slater Invictus Shoes." That is an accurate and truthful description of them. Unless there are circumstances which indicate that he so advertises these goods for the purpose of falsely representing them as the goods of the plaintiff, he cannot be restrained from doing so. The only circumstance pointing in that direction, as it appears to me, is the fact that the words "Slater" and "Shoes" are printed in larger type than the other words of the advertisement. That circumstance may and in fact does excite in my mind a suspicion that these words were so printed to take advantage of the reputation which the plaintiffs' shoes had acquired under that name, but I cannot say that it amounts to more than a suspicion. The defendant swears that the advertisement was inserted in that form by his advertising agent without his knowledge, and the fact that it was discontinued after two insertions and apparently before any exception was taken to it by the plaintiffs, would tend to support the defendant's bona fides. If there had been any evidence that the advertisement was inserted in the form in which it appeared by direction of the defendant, or if he had allowed it to continue after it had come to his notice, I should have thought the case came within the principle of Cash v. Cash, 86 L. T. N. S. 211, wherein the defendant, although his name was Cash, was restrained from selling his goods as "Cash's Frillings," without taking reasonable precautions to clearly distinguish the frillings manufactured by the defendant from those of the plaintiff, on the ground that the plaintiff's goods had become known to the public as "Cash's Frillings."

On the whole I think the plaintiffs' motion fails.

By consent the motion for an injunction was turned into a motion for judgment. The motion will therefore be refused and the action dismissed with costs.

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MANITOBA.

MATHERS, J. JANUARY 15TH, 1907.

CHAMBERS.

MOORE v. SCOTT.

Security for Costs — Praecipe Order — Application for Increased Security—Practice—Appeal.

Application by defendants for increased security for costs, after judgment in favour of defendants, and pending an appeal to the Court of Appeal.

H. A. Burbidge, for defendants.

J. F. Fisher, for plaintiff.

MATHERS, J.:—At the commencement of the action defendants took out the ordinary præcipe order, in satisfaction of which plaintiff paid into court $200.

The taxed costs of defendants amount to $444.16, and defendants' solicitor swore that the costs of appeal will be at least $300 more. The motion is opposed on the ground that defendants, having taken a præcipe order which could be satisfied by paying $200 into court, instead of making a special application for reasonable security, as they might have done, are bound by their election.

In support of that argument Bell v. Landon, 9 P. R. 100, Trevelyan v. Myers, 15 C. L. T. Occ. N. 135, and D'Ivry v. World Newspaper Co., 17 C. L. T. Occ. N. 82, are cited. None of these cases, however, was decided on the narrow ground that because the defendant chose to take a præcipe order instead of making a special application he was bound by his election. All of them were appeals from an order refusing the increase, and in each of them there were material circumstances on which the Judge acted in declining to interfere with the discretion of the officer who refused the increase.

The practice in cases of this kind is correctly laid down by the Ontario Divisional Court in the recent case of Stand-

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ard Trading Co. v. Seybold, 5 O. L. R. 8, 1 O. W. R. 724, 783. Meredith, J., there says: "Increasing or diminishing security already given is a matter for the exercise of judicial discretion, having regard to all the circumstances of each case." The decision in that case was not based on any change in the Rules, but merely declares the practice as it always was, and explains away the rule apparently laid down by the earlier case of Bell v. Landon, 9 P. R. 100, and the cases which followed that one. The case of Charlebois v. Great North West Central R. W. Co., 9 Man. L. R. 60, is not consistent with Standard Trading Co. v. Seybold. In discussing sec. 34 of the Administration of Justice Act, the provision then in force, Taylor, C.J., there says: "I have no doubt that, although an order for security has been made and complied with, an order for further security can be granted upon a proper case being made." It would appear from this that Rule 937 has effected no change in the practice. The corresponding Ontario Rule, although worded somewhat differently from our Rule 987, is, I think, in effect the same.

Ordinarily, no doubt, a Judge would, in the exercise of his discretion, refuse to make an order for increased security where, at the time the first order was obtained, it was apparent that a second application would have to be made. This would not, however, be upon the ground that there was anything in the practice of the Court to prevent such an application being granted, but upon the ground that litigants should be discouraged from needlessly increasing costs by making two applications where one should have been sufficient.

In this case I see no reason why an order for increased security should not be made.

The costs already incurred are $444.16, and an appeal is pending, which will considerably increase the costs.

I think increased security to the amount of $400 should be given, and I so order.

Costs of the application will be in the cause.

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MATHERS, J. JANUARY 15TH, 1907.

CHAMBERS.

GRIFFITHS v. WINNIPEG ELECTRIC R. W. CO.

Jury—Application for Order Directing Trial by Jury—Onus—Action for Personal Injuries—Discretion—Assessment of Damages.

Application by plaintiff under sec. 59 of the King's Bench Act to have the action tried by a jury.

Plaintiff was an infant who sued by his next friend.

The statement of claim alleged that on or about 5th September, 1906, plaintiff was riding his bicycle in a northerly direction along the east side of Main street, in the city of Winnipeg, and when nearing the intersection of York avenue and Main street, he allowed a Park line car going northwards to pass him, and immediately afterwards crossed the track behind that car for the purpose of passing up York avenue. As he was about to cross the second track, a work car belonging to and operated by the defendants, was going south, running as alleged at an excessive and immoderate rate of speed, and not sounding the gong on the car. The work car was without a fender.

Owing to the absence of a fender on the car, plaintiff was forced to swerve to one side to avoid being run over by the car, and owing to excessive rate of speed of the car and the absence of the sounding of the gong, plaintiff was unable to get out of the way of the car and was knocked down and severely bruised, and the wheels of the car passed over his right arm, severing it from his body.

It was charged that defendants were guilty of negligence in not having the car equipped with a fender, in driving the car at excessive speed, and in not sounding the gong in passing another car in the opposite direction, and damages were claimed.

The defendants denied all charges of negligence or unskilfulness on the part of themselves, or their servants, and alleged that the injuries of the plaintiff were not caused by

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any of the acts complained of, but arose from the negligence of plaintiff. The defendants also pleaded contributory negligence, and not guilty by statute, and that plaintiff had not alleged any facts entitling him to relief or damages against them.

W. Monahan, for plaintiff.

D. H. Laird, for defendants.

MATHERS, J.:—Until 1891 either party to a civil action at law had the right, by simply giving notice in his pleading to that effect, to have the issues of fact tried by a jury, subject to the right of the opposite party to have the jury notice struck out upon application to a Judge in Chambers, except in the case of actions for libel, slander, criminal conversation, seduction, breach of promise of marriage, malicious arrest, and malicious prosecution, in which latter cases the action should be tried by a jury, unless such mode of trial were waived by the parties or their attorneys or counsel. In that year by 54 Vict. ch. 1, sec. 33, sec. 23 of the Queen's Bench Act, 1885, was repealed and a new section substituted, by which it was provided that all issues of fact in civil actions and proceedings at law, except the cases of libel and slander only, should be tried by a Judge without a jury, provided that an application might be made to a Judge in Chambers to have the issues tried by a jury. While the law stood thus the cases of Morrison v. Robinson, 8 Man. L. R. 218, Case v. Laird, 8 Man. L. R. 461, Harvey v. Snowden, 9 Man. L. R. 313, and Woolacott v. Winnipeg Electric Street R. W. Co., 10 Man. L. R. 482, were decided. The ratio decidendi of these cases is that the legislature having made trial by Judge without a jury the normal mode of trial, the onus lies upon the party applying for trial by jury of shewing that the case should be tried by a jury and not by a Judge.

By the Queen's Bench Act of 1895 the list of actions that should be tried by a jury unless the parties waived such method of trial was considerably enlarged and was made to include in addition to libel and slander—the only actions so triable under the Act of 1891—breach of promise of marriage, illegal or excessive distress, illegal or excessive seizure, criminal conversation, seduction, malicious arrest, malicious prosecution, false imprisonment, breach of warranty, and for the recovery of damages under the Work-

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men's Compensation for Injuries Act. A new provision was also by this Act introduced giving the Judge presiding at a trial discretion to direct the action or issues to be tried by a jury. Whilst this Act may indicate a more favourable tendency of the legislature towards juries, it makes no change in the law with respect to the principle upon which a jury can be obtained in other than the classes of actions above named—and the onus still rests upon the party applying for a jury of shewing some good reason why the action should be so tried.

The law as it stands presents several anomalies—an action for breach of warranty (which is contract) may be tried by a jury, but an action for breach of contract may not be so tried. A workman who sustains injury through the negligence of a fellow workman may have his action against his employer tried by a jury, but a workman who sustains injury through the negligence of the employer direct is not entitled to a jury to try his action against the same employer. It is difficult to discover the reason why one class of litigant is excluded from the right of trial by jury and the other admitted, but the distinction exists, and it is the business of the Court to interpret legislation as it finds it.

The case of Woolacott v. Winnipeg Electric Street R. W. Co., 10 Man. L. R. 482, is the only reported Manitoba case on the question in which the facts are stated. No case can, however, be of much value as a guide to the exercise of discretion in any particular case. Even in cases where the facts are similar, a Judge is not bound to exercise his discretion in the same way. As said by Kay, L.J., in Jenkins v. Bushby, [1891] 1 Ch. 495, in dealing with an application for a jury: "No two cases are exactly alike, and even if they were the Court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion."

In the Woolacott case the present Chief Justice refused an order for a jury, and an appeal to the full Court was dismissed. That case in many respects resembles the present case, but there are likewise important differences. There the plaintiff was knocked down and injured by defendants' car, but the extent or nature of his injuries does not appear. In this case a boy under the age of 21 years has

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had his arm taken off. If defendants are liable, the tribunal trying the action will be called upon to assess the damage plaintiff has sustained by the loss of his arm. Where the injured party has only been temporarily disabled for a longer or shorter period, and has been put to medical and other charges, the question of damage presents to my mind no such difficulty as the question of appraising the value of a limb does. I confess I would approach such a task with trepidation. As stated by Killam, J., in the Woolacott case, "There are many cases involving matters with which jurymen are usually more familiar than Judges, and upon which the concurrent opinion of several of them may be more likely to be correct than that of one Judge," and in my opinion this is one of such matters.

There is another principle also on which it seems to me this is a proper case for a jury. The defendants are charged with three acts of negligence, viz., excessive speed of car, not ringing gong, and not having a fender on the car. The defendants deny all these charges of negligence, and allege that the injury was caused or contributed to by plaintiff's negligence. The determination of these questions will put an end to the action. In Cardinal v. Cardinal, 25 Ch. D. at p. 777, Pearson, J., says: "I think the intention was that if it appeared that there was a simple question of fact, the verdict upon which would decide the issue in the action, it should be sent for trial by a jury."

The remarks of Bain, J., in Case v. Laird, 8 Man. L. R. 463, would indicate that he entertained similar views, and in Sheppard v. Gilmore, 34 Ch. D. 179, Kay. J., said: "If the determination of the issue which is sought to have submitted to a jury . . . would put an end to the action, that would be a strong reason for allowing it to be tried . . . by a jury."

It is said that there are questions of law raised by the defendants' plea of not guilty by statute. I have looked at all the statutes mentioned in the margin of this plea, and I do not think any question of law is thereby raised that a Judge cannot fully and readily instruct the jury upon.

In my opinion, plaintiff has satisfied the onus upon him of shewing that this is a case that can more properly be tried by a Judge and jury than by a Judge alone, and,

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in the exercise of my discretion under the statute, I order it to be so tried.

Costs will be costs in the cause.

MANITOBA.

MATHERS, J. JANUARY 19TH, 1907.

TRIAL.

CAMPBELL v. CANADIAN CO-OPERATIVE INVESTMENT CO.

Mortgage—Undertaking of Mortgagee to Insure—Neglect to Complete Insurance—Destruction of Buildings by Fire—Action by Mortgagor—Gross Negligence — Assignment of Mortgage—Set-off—Costs.

On 2nd February, 1904, plaintiff mortgaged his hotel property at Carman to the defendant investment company. At that time he had a policy of insurance in the Canadian Fire Insurance Company for $2,000, divided as follows: $1,400 on the building; $500 on hotel furniture; $50 on pool table; and $50 on separate sample room. At the request of plaintiff this policy was indorsed with a statement of loss payable to the investment company, as their interest might appear. When the policy expired on 11th November, 1904, a new policy was issued in the name of plaintiff, for the same amount, covering the same property, and with loss payable in the same way, which would expire on 11th November, 1905. When the mortgage was taken, the investment company placed additional insurance to the amount of $1,000 on the building in the Occidental Fire Insurance Company of Wawanesa.

On 29th October, 1905, the investment company wrote a letter to the Canadian company in relation to the insurance in that company, saying: "We beg to say that we are placing the amount of insurance, $2,000, in a company of our own, and you will therefore not be required to renew the same;" and on the same day the investment company

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wrote a letter to the Occidental company as follows: "We are desirous of transferring a risk of $2,000 on Carman property owned by A. R. Campbell to your company, and will ask you to have your agent at Carman make the necessary examination and report. The property is a two-storey, frame, metal-roofed building, occupied as an hotel and known as the Carman House. We had $1,400 on the building, $500 on the furniture, $50 on the pool table, and $50 on the sample room. Kindly let us know if you will attend to this at once, as the policy expires November 11th."

On 4th November the Occidental company replied: "Re the Carman risk, your letter with instructions were forwarded to our agent, Mr. Haverson, at Carman a few days ago."

The Mr. Haverson referred to was the president and solicitor for the investment company, and resided and carried on business at Carman, but the office of the company and its other officers were at Winnipeg. Nothing further was done by either the investment company or the Occidental company, and apparently nothing was done by Mr. Haverson, because the new insurance was not placed in the Occidental company. On 11th November the policy in the Canadian company expired.

On 11th December following the investment company assigned to their co-defendants, the Northern Trusts Co., the mortgage in question, together with a large number of other mortgages, securities, and other assets, upon trust to realize upon and collect the premises so assigned and to pay the debts of the investment company, after providing for the expenses of and remuneration of the trust company, and on the following day the trust company took possession of the assigned assets. On 24th December the mortgaged property at Carman was totally destroyed by fire. The Occidental company paid to the trust company the amount of the loss under the $1,000 policy placed with that company at the time the mortgage was taken, which reduced the amount of the mortgage to about $1,600.

On 24th April, 1906, the trust company, in the name of the investment company, served plaintiff with notice of exercising the power of sale contained in the mortgage.

This action was begun on 30th April, 1906, to recover from the investment company $2,000 or the balance of that sum that would remain after the mortgage was satisfied,

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because of the negligence of the investment company in relation to said insurance, and for a declaration that the defendant trust company held said assigned mortgage subject to the right of the plaintiff to have the moneys recovered against the investment company applied in satisfaction of the mortgage, and for other incidental relief.

W. F. Hull, for plaintiff.

J. A. M. Aikins, K.C., and J. B. Hugg, for defendants.

MATHERS, J.:—There is no controversy as to the facts stated above. I now come to deal with some facts concerning which there is a conflict of testimony. Plaintiff says that some time before the fire he got a letter from the investment company, which letter was afterwards destroyed in the fire. Plaintiff can neither read nor write, and he got his son-in-law to read the letter to him. In consequence of what he was told the letter contained, he spoke to Mr. Gordon, the secretary of the company, over the long distance telephone, and asked him "what was his idea in making a change in the insurance," to which Gordon replied that he wanted to have it all together. Plaintiff then said "Well, look after it." A few days afterwards plaintiff, being anxious about the insurance again, he says, spoke to Gordon over the telephone and received the assurance that he, Gordon, was looking after it.

Gordon was secretary-treasurer of the investment company, and W. D. Rutton was manager. Gordon says he did not write the letter to which plaintiff refers, and does not know if one was written, and Rutton, who had charge of the insurance matters of the company, was not called as a witness, although present in Court. Gordon further says that he has no recollection of plaintiff telephoning to him about the insurance, and feels perfectly satisfied that no such telephone message was received by him. Upon this conflicting evidence, I find that about the time the Canadian Company was notified not to renew the policy in the company a letter was also written to and received by plaintiff notifying him of the intended transfer. I find also that plaintiff had the conversation with Gordon over the telephone which he says he had. Plaintiff, being a man who could neither read nor write, would necessarily be in the habit of relying upon his memory to a greater extent than a person who possessed these accomplishments, and I think

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his memory of what occurred is more likely to be reliable than Gordon's memory is. I say this without in any way reflecting upon Mr. Gordon, who I believe gave his evidence with perfect honesty. Besides, it appears to me highly probable that the company would notify plaintiff of the intended change in the insurance, and I think it equally probable that plaintiff upon receiving such a notification would inquire why the change was being made.

The other fact in controversy is, whether or not plaintiff was notified before the fire of the assignment of his mortgage to the trust company. Plaintiff says that until after the fire he had no notice of the assignment. Upon taking possession of the investment company's assets the trust company on 15th December caused a circular letter to be printed, containing amongst other things a notification that the investment company's assets had been handed over to them. This circular was certainly mailed to some of the contract-holders and mortgagors, but no list was prepared from which the mailing was done, and no evidence was given from which even a presumption could be drawn that it was mailed to all mortgagors. From this evidence I find it impossible to hold that the circular letter was mailed to plaintiff, much less that it was received by him. I therefore hold that before the fire plaintiff had no notice of the assignment to the trust company.

The case of plaintiff is that the investment company voluntarily undertook to transfer the insurance in question from the Canadian company and went so far as to prevent a renewal of the policy in the Canadian company, but neglected to procure insurance in the Occidental company. The law on the point is thus laid down by Willes, J., in Skelton v. London and North Western R. W. Co., L .R. 2 C. P. at p. 636: "If a person undertakes to perform a voluntary act he is liable, if he perform it improperly, but not if he neglects to perform it. Such is the result of the decision in Coggs v. Bernard." See also Smith's Leading Cases, vol. 1, p. 188. In this regard the voluntary act which the investment company undertook to perform was the transfer of $2,000 insurance from the one company to the other. As the first step in the performance of this act they notified the Canadian company not to renew the policy. As the second step a letter was written to the Occidental company notifying that company of the desire

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to make the change and asking them to have their agent report. But they neglected to follow the matter up any further and see that the new insurance was actually placed. The failure to do so was, in my opinion, gross neglect. I think these facts bring the investment company within the statement of the law above quoted, and that they are liable to plaintiff for the loss he sustained by reason of such neglect.

At the trial a good deal of discussion took place as to the meaning of the insurance covenant in the mortgage, and it was argued that under the covenant the only power the company had was, in the words of the covenant, to "cancel existing insurance and insure in a company to be named by them," and that what the company did here was not a cancellation of existing insurance, and therefore was not within the purview of the covenant. It does not appear to me material to inquire whether or not the company had a right under the covenant to do what they did. The company did undertake to transfer the insurance from one company to another, with the assent of plaintiff, and I cannot see that it makes any difference whether or not in doing so they were or were not exercising a right given by the covenant. The company would, in my opinion, be equally liable in either case, if the undertaking was so negligently carried out as to cause loss to plaintiff.

It was further argued that the undertaking being matter of contract, and not being under the company's seal, they are not liable. To the common law rule that a corporation can only bind itself by deed, or writing under seal, there are several exceptions, one of which is that a trading corporation may make the contracts required in the course of business in the usual form of such contracts without the corporate seal, and another is where it becomes practically necessary to dispense with the seal by reason of frequent occurrence of the occasion. The insurance of the properties covered by the company's mortgages was a necessary part of the investment company's business, and the placing, cancellation, transfer, and renewal of such insurance must have been matter of very frequent occurrence. Such matters would be a necessary part of the routine business of the company as an investment and loan company, and as such would not, in my opinion, require a seal.

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What I have said applies to insurance upon the property covered by the company's mortgage. As to property not so covered, an undertaking to insure such would not be within the ordinary scope of the company's business, and would consequently not come within any of the exceptions to the common law rule, and would require a seal. It follows that the investment company can only be held liable for $1,450, the amount of insurance on the real estate.

In view of the conclusion I have arrived at, it is unnecessary to discuss the question raised as to the company having no insurable interest in any property except that covered by their mortgage.

It was further contended that Gordon, with whom plaintiff had the conversation above referred to, had nothing to do with the insurance, but that that branch of the company's business was in charge of the manager, Mr. Rutton. The letters written to the Canadian and Occidental companies were written by Rutton, and it is probable also that the letter sent to plaintiff was written by the same officer. Gordon says it is probable he discussed the matter with Rutton, and I have no doubt but that Rutton knew of his conversations with plaintiff, and that the company are bound thereby.

It remains to consider whether this claim can be set off against the mortgage in the hands of the trust company. Section 39 of the King's Bench Act, sub-sec. (f), provides that an assignment of a chose in action arising out of contract not assignable by delivery shall be subject to any defence or set-off existing at the time of notice of such assignment to the debtor, "in the same manner and to the same extent as such defence or set-off would be effective in case there had been no assignment thereof."

"As against an assignee without notice, the mortgagor has the same rights as against the mortgagee, and whatever he can claim in the way of set-off or mutual credit as against the mortgagee he can claim equally against the assignee:" per Sir John Leach in Norrish v. Marshall, 5 Madd. 481, cited with approval in Turner v. Smith, [1901] 1 Ch. 220. See also McPherson v. Dougan, 9 Gr. 260; Elliott v. McConnell, 21 Gr. 376; and Martin v. Bearman, 45 U. C. R. 205. Unliquidated damages may now be set off as between the original parties, and also as against an assignee, if flowing out of and inseparably connected with the dealings and

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transactions which also gave rise to the subject of the assignment: Newfoundland v. Newfoundland, 13 App. Cas. 213.

If there had been no assignment I do not think the Court would hesitate to set this claim off against the mortgage.

The assignee in this case is not in the position of a purchaser for value: Parker on Frauds, p. 252.

In my opinion, therefore, plaintiff has a right to have this claim set off against the mortgage in the hands of the trust company.

There will be judgment against the investment company for $1,450, and a declaration that, to that extent, the mortgage in the hands of the trust company is paid, together with costs against both companies.

MANITOBA.

MATHERS, J. JANUARY 19TH, 1907.

TRIAL.

McLEOD v. McCUTCHEON.

Sale of Goods—Supplementary Agreement to Exchange if Found Unsuitable—Condition of Goods—Onus of Proof —Evidence.

The plaintiffs McLeod and Wilson were horse dealers and sales stable keepers; the defendant a brickmaker and wood dealer. In the autumn of 1906 the parties had transactions together with regard to the purchase of a team of horses. A team of greys were sent to the defendant, as he stated, on the understanding that they were to be replaced by another span to be picked from a carload which the plaintiffs were bringing from Ontario. The plaintiffs received from the defendant a promissory note in payment for the horses, amounting to $475. Defendant used the horses in his business, but said he found them unsuitable, they not being able to draw 2,000 bricks, as they should have been able to do, but even found difficulty with a load of from 1,400 to 1,600. He told

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plaintiff McLeod this, and the latter said that as soon as the new horses arrived defendant was to have his pick from them.

In the meantime the note which defendant had given fell due, and this action was brought thereon against defendant, in which he counterclaimed for the amount of the note and the board of the horses since September, 1906, since which time he had not been able to work them.

The plaintiffs denied the bargain set out by defendant and alleged that the sale was an out-and-out one, and they contended that the work which the animals were expected by defendant to do was altogether too heavy, and at the trial plaintiff McLeod testified that he was still willing to make an exchange of horses if at any time he had animals that would suit defendant, and if the latter would return the team in question to him in as good condition as when he got them.

Defendant paid the note, and set the counterclaim down for trial.

H. P. Blackwood and C. P. Fullerton, for defendant.

W. Boston Towers, for plaintiffs.

MATHERS, J.:—The question involved on this trial was the defendant's counterclaim only—the plaintiffs' cause of action against the defendant having been previously disposed of.

In the view I take of the evidence, this is not the case of a sale on condition that the team was suitable for the work for which the defendant required them, with the right of return if found unsuitable, but is the case of a sale with a supplementary agreement to exchange the horses for another team if the defendant found them unsuitable for his work.

The defendant's counterclaim was framed and the trial proceeded upon the theory of a conditional sale with a right of return.

The defendant has failed, in my opinion, to make out such a case. But, even if he had, I do not think he could succeed because he cannot return the horses in the condition in which they were when sold.

One of the defendant's witnesses said that he thought the mare was now foundered. The evidence shews that to be a

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very serious injury and such as could only be caused by great carelessness.

The evidence on this point is not as conclusive or satisfactory as it might be, but, as no attempt was made to deny or explain the evidence of this witness, I cannot disregard it.

Whether or not the witness has correctly diagnosed the mare's unsoundness, I am satisfied by his evidence that she is now unsound, as the result of some injury received while in defendant's possession. If the injury was caused without any fault on the part of defendant (the onus of shewing which would clearly be on him), his right to return the animals would not be taken away, but not so if the injury were due to his fault: Head v. Tattershall, L. R. 7 Ex. 7.

It was objected that plaintiffs have not pleaded that the horses are not in the same condition as when sold to the defendant, and cannot therefore rely upon this evidence.

The team has been in the defendant's possession, and plaintiffs may not have known anything about their condition until this evidence was given. As the evidence was given by defendant's own witness in answer to his own counsel, I do not think he is in a position to say that he was taken by surprise and that the plaintiffs should not now be allowed to raise the defence.

I dismiss the defendant's counterclaim with costs.

BRITISH COLUMBIA.

(VICTORIA.)

LAMPMAN, Co.C.J. DECEMBER 4TH, 1906.

COUNTY COURT OF VICTORIA.

CITY OF VICTORIA v. BELYEA.

Municipal Corporations—By-law—Amendment — Mistake — Construction—License Fee—Barristers and Solicitors.

Action by the city corporation against E. V. Belyea to recover $72.50, being the amount of the barrister and solicitor license tax alleged to be owing by him for the period from 15th January, 1901, to 15th July, 1905.

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The defendant admitted that he had not paid the tax, and that he was practising in Victoria as a barrister and solicitor during the period for which the taxes were claimed.

D. M. Eberts, K.C., for plaintiffs.

The defendant in person.

LAMPMAN, Co. C.J.:—In the appeal proceedings in May last between the same parties, the same questions, save one, were argued before me, and in my judgment (dated 1st June) the points then raised were decided by me in favour of the corporation, and I see no reason to alter the opinion I then formed.

In my former judgment I referred at length to the statutes and by-laws affecting the question, and so do not now set them out.

Mr. Belyea now argues that by-law No. 393 of 1902, amending by-law No. 321 of 1900, does not fix a license tax to be paid by barristers and solicitors. Section 27 of the original by-law No. 321, as passed by the council, is as follows:—

27. From every person following, within the municipality, any trade, occupation, or calling, not hereinbefore enumerated, or who enters into or carries on any contract or agreement to perform any work or furnish any materials, $5 for every six months. Provided always, that no person employed as a journeyman, or for wages only, and not employing any other person or persons, shall be subject to the provisions of this section.

In it, it will be seen that the word "any" where it first occurs is in the second line of the section. For use at the city hall there is a printed book of by-laws, and in it the number of words to the line is not the same as in the original: in it, in the section in question, the word "any" first occurs in the first line instead of in the second line as in the original.

In amending the by-law No. 321 in 1902 by s. 7 (c) of No. 393 the word "profession" is added after the word "any" in the first line of the original by-law, but, as the word "any" does not occur in the first line, Mr. Belyea argues that the amendment is bad. The mistake probably occurred by reason of the council not using the original copy in making the amendment.

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Counsel for the plaintiffs contends that it is clear what was meant, and that the amendment must be given a reasonable construction; and he cites Esquimalt Water Works Co. v. City of Victoria, 10 B. C. R. 193; Ex p. Walton, 17 Ch. D. 746; Mersey Steel and Iron Co. v. Naylor, 9 Q. B. D. 648; and Salmon v. Duncombe, 11 App. Cas. 627.

Now it is well settled that legislation will not be held to be meaningless or absurd unless the language used is absolutely unmanageable, and also that mere want of skill on the part of the draftsman will not be allowed to prejudice the rights of the parties. In Kruse v. Johnson, [1898] 2 Q. B. 91, Lord Russell of Killowen, C.J., said that municipal by-laws should be "benevolently" interpreted. But, even giving the corporation the benefit of a benevolent construction, I think Mr. Belyea's contention must prevail. If the word "any" occurred only once in the section, there would be no difficulty in giving the amendment the meaning probably intended, but it occurs three times; and if the word "profession" were added after it where it occurs the second time, it is not beyond reasonable argument that the amendment would be sensible. It is the element of doubt and uncertainty which makes the amendment bad. The plaintiff corporation is entitled to judgment for $37.50, being amount of license fees payable . . . before the amendment in 1902.

The plaintiffs only ask for Court fees and disbursements, so no costs other than those will be taxed.

BRITISH COLUMBIA.

(NANAIMO.)

HARRISON, Co. C.J. DECEMBER 7TH, 1906.

ARBITRATION.

RE McALONEY AND WESTERN FUEL CO.

Master and Servant — Injury to Servant and Consequent Death—Workmen's Compensation Act—Failure of Evidence to Establish how Injury Occurred—Workman's Serious Neglect—Onus of Proof.

Arbitration under the Workmen's Compensation Act, 1902, between Joseph McAloney, administrator of the estate

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of Henry Tommeri, and Johanne Tommeri, of Karstula, Finland, the applicants, and the company, respondents, as to compensation to be paid for the death of Henry Tommeri when in the employment of the company.

Brydon Jack, for applicants.

E. M. Yarwood, for respondents.

HARRISON, Co. C.J.:—The deceased Henry Tommeri was a workman in the employment of the respondents, and employed in their coal mines as a pusher, and while so employed was killed through being struck by a box loaded with coal and forced against a prop in the workings of the mine. At the particular place in the mine where he was working, miners were getting out coal from pillars; as the coal was got out, it was filled into boxes or cars, and the deceased Tommeri was one of the pushers employed to get the loaded boxes from the working place. From this working place rails were laid down, on which the loaded coal boxes were run out, and the empty boxes were brought back to the face of the coal. A single track ran from the face. Along this track there was an incline for about 8 feet, and then came a level space called the knuckle, which was about the length of a coal box. From the knuckle a double track went down an incline, on which the full cars going down brought up the empties to the knuckle, where the two tracks merged into the single track thence on to the face. The incline down from the knuckle was so steep that two men (unless aided by some mechanical contrivance operating as a brake) could not hold back a loaded car going down. At the time of the accident there were only two diggers and the pusher (the deceased Tommeri) in that vicinity, though other persons, respondents' representatives and employees, were in the habit of passing up and down this track. The diggers heard the pusher scream, and they went down the track and found him below the knuckle some distance down the steep incline jammed against a prop by a loaded box; they got the box away, and in a very short space of time he died from the effects of the injuries he had received through being crushed between the box and the prop. No inquest was held.

It is contended on the part of the respondents that the accident must have occurred solely through his own serious neglect; that it was dangerous to bring down a loaded car by

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getting in front of it; that the proper way to run out the car after being on the level at the face was by means of sprags or by means of a rope fastened to one of the props supporting the roof, and to let down the car to the knuckle where it would be blocked by a beam of wood (called the block) lying loosely on the ground and placed between the knuckle and a prop below the knuckle in such a way that one end of the block would rest against the prop and the other end would block the car. Then the pusher would fasten one end of the incline rope to the back of the loaded car and remove the block, and remaining behind on the knuckle by means of a rope called the "McGinty" rope (and also called a safety rope) he would regulate the car's descent from the knuckle, and as the empties came up the pusher would replace the block so as to block the next loaded car on its descent at the knuckle. The loaded car was found at the time of the accident unattached to the incline rope, and the block was found out of position, and it is argued that Tommeri must have met his death through improperly getting in front of the car and not remaining behind it.

I find that there are no rules forbidding running out a loaded car by getting in front of it. It appears from the evidence that some months before the accident the incline on the single track was so steep that for some time the loaded boxes were got down to the knuckle by two pushers to each load, one in front and one behind a loaded car. One of the pushers then employed refused to lower the boxes down the incline on the single track unless a rope were supplied. The company's representatives supplied a rope, but the pushers only used it a day or so, and it was thrown aside; though there is nothing to shew that Tommeri knew of this rope or of its ever having been used. As the mining went on, the grade of the incline on the single track was decreased to its present grade, and only one pusher was employed to run out a loaded box, and for weeks immediately preceding the accident the pushers had run down the boxes on the single track by getting in front of loaded box. That the pushers were in the habit of doing so at this part of the track was known to the representatives of the company, who did not in any way attempt to stop the practice in that locality, though they were in the habit of telling the men not to get in front of the cars in places so steep that they considered them dangerous; but there is no evidence that Tommeri was so warned.

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Under the Act compensation is not to be disallowed in a case like the present one, unless it is proved that the accident is attributable "solely to the serious neglect" of the workman injured. And I have come to the conclusion that the evidence does not establish that the accident is so attributable to the deceased workman. There is no evidence of any eye witness to the accident. The fact of being in front of a loaded car would not of itself establish that the person in front of it was there through negligence on his part. There is nothing to shew at what part of the track between the face and where Tommeri was killed, or under what circumstances, his body first came to be in front of the car, or whether he got in front of the car of his own accord or not. Neither of the diggers who lifted the car from the injured man say anything about the incline rope being unattached to the car when they first found him. It was first noticed detached from the car about a quarter of an hour afterwards, and there is no evidence as to the manner in which or by what means Tommeri was supposed to attach it to the back of the car; but the incline rope would not stop the descent of the car except in so far as the weight of the empty on the other track would do so. The block itself was not in evidence at the hearing. If in front of the car at or above the knuckle, he may have been unable to hold it back, and while trying to do so may have accidentally misplaced the block, or the block may not have been placed in a position by the man who ran out the loaded car next preceding the one the deceased went down with, and there is no direct evidence that he let down that preceding car. It is true that one of the respondents' representatives says that Tommeri had been working there several hours before the accident, but this statement, though no doubt given in perfect good faith, is defective in this respect, that the source of his knowledge, information, and belief does not appear. He does not say he saw the deceased, or if he did how often he saw him. And if he did see him, Tommeri, whatever he was working at, must have been doing his work in a manner which met with his approval, otherwise we should have heard of it. Witnesses in cases of this kind are honestly enough apt to give their evidence unconsciously affected by the fact of serious consequences having followed an act, and to speak of practices which even they themselves have previously followed without their foreseeing or experiencing any ill consequences, as being dangerous in view of someone else

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having been afterwards fatally injured through doing the like thing and doing it in the same way.

Difficulty arises in adopting a statute of which "the object was to entitle the workmen who sustained injury whilst engaged in certain employments to recover compensation from the employer where the employer was guilty of no default," and importing into the British Columbia statute the question of negligence which cannot arise under the Act of which the British Columbia statute is, with this important exception, practically a copy. But there is no telling how the accident occurred in this instance, and the burden of proving that the accident was attributable solely to the workman's serious neglect is on the respondents: vide Johnson v. Marshall Sons & Co., 22 Times L. R. 565. Hill v. Granby Consolidated Mines, 12 B. C. R., was referred to, but there serious neglect on the part of the man killed was proved, and the applicant's counsel admitted that under the circumstances in that case the applicant could not succeed on the point whether the injury was "solely" attributable to his neglect, if the employers succeeded in shewing that the injury was not in any way attributable to any breach of duty on their part. The applicants here contend that there was a breach of duty on the part of the respondents in not providing a stationary block working on a pin and lying across the track in front of the knuckle and fitting into or against a catch on the side of the track opposite the pin. In answer to this the company's representatives say that the track in question was only a temporary track, and the method of blocking in use was the one which had always been used, and that it is not usual to block cars in the way suggested except in permanent places. While the accident in this case might not have happened if the plan suggested had been adopted, the case of Hill v. Granby Consolidated Mines, and Wood v. Canadian Pacific R. W. Co., cited therein, acquit the respondents in this respect, as it is in no way obvious that the accident was likely to result from such an omission, and the method of blocking adopted appears to have been the one always adopted in such circumstances and for years with safety.

The applicants also asserted that there were no manholes, but manholes, after all, mean open spaces at least 3 feet wide, and here there was an open space of 3 feet between each prop and the next prop, and there were all along the track open

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spaces of at least 6 feet wide on the other side of the track opposite the props.

As it appears that the applicant Johanne Tommeri was not wholly but in part dependent on the earnings of the deceased workman, I award as compensation the sum of $450, with costs to be paid by the respondents.

BRITISH COLUMBIA.

(VANCOUVER.)

HUNTER, C.J. DECEMBER 10TH. 1906.

TRIAL.

McMEEKIN v. FURRY.

Contract—Sale of Mineral Claims—Interests in Proceeds—Conflicting Evidence — Division of Proceeds of Sale—Declaratory Judgment.

Action for a declaration of the Court as to what interests in the proceeds of sale of certain mineral claims the plaintiff and defendants were respectively entitled to, the defendant Furry claiming an undivided one half interest in the Empress, Queen, and Victoria mineral claims, or their proceeds; while it was alleged on the contrary that he was only entitled to a fifth of the proceeds of sale of these claims, together with another claim called the Barbara Fraction.

Bowser, K.C., for plaintiff.

J. Martin, K.C., for defendants.

HUNTER, C.J.:—At the trial the only question about which I was in doubt was the question of fact, namely, as to whether Furry had exchanged his undivided one half interest in the Victoria, Queen, and Empress claims for an undivided fifth interest in those claims together with the Barbara Fraction.

According to the testimony of David Boscowitz he was present at an interview between his brother Leo and Furry

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at the Commercial Hotel, Vancouver, in 1900, in which Leo agreed to give Furry a 20 per cent. interest in the 3 original claims and the Barbara Fraction and 3 or 4 other claims in lieu of Furry's half interest in the 3 original claims; that the reason for this arrangement was that, as Leo told Furry, he could not sell the claims in the position they were in; that Furry agreed to this arrangement; that they then went to the office of Davis, Marshall, & McNeill; that Mr. Weart, who was then a clerk in that office, and his brother talked the matter over, and that Mr. Weart drew the document of 2nd June, 1900; that it was shewn to Furry; and that Leo signed it in Furry's presence; that the document was in duplicate, but that he does not recollect whether it was signed in duplicate; that Furry took one away with him; that he then departed, leaving Leo and the witness in the office.

Mr. Weart, who became solicitor pendente lite for Furry, being cross-examined, would not contradict a statement which was taken by Mr. Bowser of his intended evidence before he became solicitor for Furry, to the effect that Leo signed the document in the presence of Furry and himself, and that Furry made no objection to it; and also admits that the document was shewn to Furry by either Leo or himself, thereby corroborating the last witness; and that Furry made no comment about it. Again, he says he is inclined to think that the original was handed to Furry, but whether by Leo or himself he could not say. On being re-called, he further testified that he explained to Furry that he was getting a 20 per cent. interest under the declaration of trust, and that Leo was retaining to himself the right to dispose of the claims if he saw fit and give him 20 per cent. net of the purchase moneys.

Leo Boscowitz says that he sent for Furry in June, 1900, to reduce his one-half interest in the three claims, and to substitute a one-fifth interest in these claims together with the Barbara Fraction, and any other fractions that comprised the Empress group; that he explained to him that he could not otherwise handle the sale of the property; that, after talking it over with him for two days, they went with his brother to Mr. Weart to have the document prepared; that after instructing him they came back in about

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an hour and a half; that he signed it in duplicate; that Mr. Weart witnessed it; that Furry put one in his pocket, and he kept the other; that he explained to Furry that he was making the same arrangement with him that he had made with Turner in the case of the Britannia group (a neighbouring group of claims); that after making this arrangement with Furry he gave Walters a 20 per cent. interest in the proceeds, his brother 20 per cent., another man 15 per cent., Turner 12½ per cent., and kept the remaining 12½ for himself. He denies having undertaken with Furry to build a trail up South Valley to the claims, although he admits there was some conversation on that subject, and explains that one reason why he could not agree to do that was because it was not certain that that was the best way to get in to the claims.

Cross-examined about the circumstances surrounding the documents of 10th November and 20th May, as well as his recollection of Furry's testimony in discovery, he became involved in numerous contradictions and gave unsatisfactory evidence, but I think this arose not from any desire to mislead the Court, but rather in part to inability to pay attention to the questions and partly to his being obsessed with the idea that the document of 2nd June, 1900, settled the question so far as he was concerned, and that nothing else in the case was of any consequence.

The next witness, Turner, says that he knew Furry about 12 years; that he was interested with him in the Britannia group of claims; that he had a conversation with him in June, 1900, in which Furry stated that he had been up to Mr. Weart with the Boscowitz brothers to get his interest reduced from 50 per cent. to 20 per cent.; that he was to get an interest in the Barbara Fraction and anything else included in the Empress group; that he had only done the same as the witness had in the case of the Britannia group; and that he had taken the document from Mr. Weart's office.

In cross-examination, witness admits that he was in Mr. Martin's office for the purpose of informing him what evidence he could give; that he said nothing about the statement of Furry as to reducing his interest; and that it was only on the eve of the trial that he warned Mr. Mar-

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tin not to call him as a witness, and he gives no explanation why he had not informed Mr. Martin of this conversation with Furry. The witness, however, asserted that it would not make much difference to him how the suit was decided, as he had interests which the purchasers would have to buy in any event.

According to the testimony of Furry given on discovery (Furry died insane shortly afterwards, and before the trial, and I will assume that his evidence is admissible, although it is objected to), it is clear that there were negotiations between himself and Leo Boscowitz regarding the proposed exchange, but Furry says that the agreement was conditioned upon the latter building a trail up South Valley. He denied being at Weart's office, or that he took or accepted any document shewing that he was entitled to a 20 per cent. interest, but said that Leo Boscowitz read him over a paper containing something about the Barbara Fraction, and, he thinks, the other claims; that, on Leo saying that he would take the papers down to the Britannia office, he replied that he could take them where he liked, that he did not want them; that they went to the Britannia office, and that Leo told a man there that he would "leave these papers for Furry," to which he, Furry, said nothing because he thought it might make a row. He admits that there was a deal on to reduce his interest, but he says he did not agree to anything except that if the trail was built he might have taken the 20 per cent. interest.

It will thus be seen that all the witnesses to this controversy are interested witnesses, and therefore I must take into account the inherent probabilities of the case. It is, in the first place, in the highest degree unlikely that Boscowitz would have entered into such an agreement as alleged by Furry, that is to say, that he was to go to the expense of building this trail on the verbal promise of Furry that he would accept a reduction of his interest. It is, moreover, undeniable that just such a reduction of Turner's interest in the Britannia group occurred to the knowledge of Furry. He was an illiterate man, without any means or any access to capital, while Boscowitz had; it would have been difficult, if not impossible, for any one to interest capital in these claims unless he could hand over a controlling interest: and at the time of the alleged reduc-

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tion of interest the value of the claims was of a highly speculative character.

The document of 2nd June, 1900, was in fact drawn up and was taken away by Furry after it was signed by Boscowitz, and there is no independent evidence to shew that it had ever left his possession, and I am unable to see how his insisting that the escrow of 1903 should be drawn up so as to shew that he still retained his original interest can be relied on to shew that he had not accepted the interest thus created in 1900. Nothing short of prompt disclaimer would have prevented that interest from vesting in him as from the delivery of the document. Of course, it may be that his reason for insisting on the escrow being drawn up so as to shew that he still retained his original interest was that he conceived that the failure to build the trail entitled him to repudiate the transaction of 2nd June, but as to that, obviously his only remedy, if he had any, was by action.

Mr. Martin contended that Furry already had a legal interest in the claims, and that before he could be held to have surrendered it for a different interest, some writing by him would have to be produced and proved. The short answer to this is that Furry had no legal interest; that he had only a right in equity to a conveyance of the half interest under the agreement of 20th May, and, as already intimated, I think the weight of evidence preponderates in favour of the view that he accepted the declaration of trust of 2nd June, 1900, in substitution of the obligation which was created by the document of 20th May.

There will therefore be a declaration that Furry's estate is entitled to 20 per cent. of the proceeds of sale. Other questions reserved.

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BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 7TH, 1907.

FULL COURT.

ESQUIMALT WATERWORKS CO. v. CITY OF VICTORIA.

Water and Watercourses — Diversion of Waters of River — Authorization by Water Records or Grants—Prior Rights in Waters—Water Clauses Consolidation Act, 1897—Water Privileges Act, 1892—Private Acts Affecting Plaintiffs—Riparian Owners—English Law Relating to Riparian Rights—Introduction into British Columbia—Appropriation of Waters—Lands Acquired by Contract—Construction of Statutes — Expropriating Statutes — Retroactivity—Effect of General Acts on Earlier Special Acts —Municipal Corporations—Water Companies—Counterclaim—Declaratory judgment.

Appeal by defendants from Judgment of DUFF, J., 4 W. L. R. 59.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

E. V. Bodwell, K.C., and W. J. Taylor, K.C., for defendants.

A. P. Luxton, K.C., and Peters, K.C., for plaintiffs.

IRVING, J.:—By the Act of 1885 plaintiffs were authorized to take any land situate within a certain area, which, in their opinion, might be required for their purposes. They were also authorized to divert and appropriate the waters of Thetis lake and Deadman's river and its tributaries. The meaning of these words "to appropriate" is "to set aside for the purposes of:" see per Nesbitt, J., in Water Commissioners of London v. Saunby, 34 S. C. R. at p. 668.

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By their Act of 1892 authority was given to the plaintiffs to divert and appropriate so much of the waters of Goldstream and its tributaries as they might deem suitable and proper (subject as therein provided), and all the rights, powers, and privileges conferred by the Act of 1885 in respect of appropriation and diversion of Thetis lake and Deadman's river were extended and made applicable to the waters of Goldstream; but for some reason, possibly because of the grant or privilege accorded to the city of Victoria by the Corporation Waterworks Act of 1873, as amended in 1892, the rights, powers, and privileges are confined to appropriation and diversion. The Act of 1892 does not profess to vest the waters of Goldstream in the plaintiffs in the same manner that the Act of 1885 vests in the plaintiffs the waters of Thetis lake and Deadman's river.

By the City of Victoria Act of 1892, also assented to 23rd April, 1892, the city water commissioner was authorized to divert and appropriate the waters of Goldstream and to acquire, compulsorily or otherwise, the rights and privileges of any person having any interest therein.

By a third Act, also assented to on 23rd April, 1892, intituled An Act to Confirm to the Crown all Unrecorded and Unappropriated Water and Water Power in the Province, and for other purposes, the legislature declared (I read from the preamble of the Act of 1897), that "All water and water power in the province, not under the exclusive jurisdiction of the Parliament of Canada, remaining unrecorded and unappropriated on the 23rd day of April, 1892, were declared to be vested in the Crown in right of the province, and it was by the said Act enacted that no right to the permanent diversion or exclusive use of any water or water power so vested in the Crown should after the said date be acquired or conferred save under privilege or power in that behalf granted or conferred by Act of the Legislative Assembly theretofore passed, or thereafter to be passed."

The water of Goldstream was on 23rd April, 1892, unappropriated, and therefore fell within the sweep of the Act of 1892.

But a right to its diversion or use had been given to the city of Victoria, and a similar right (subject, however,

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to the right of the city of Victoria), had been given to the Esquimalt Waterworks Company.

Parliament imposed no terms as to the time within which the city or the company should exercise the rights conferred on them respectively; nor did it indicate whether the user of Goldstream was to be a joint user; nor did it prescribe how disputes should be settled in the event of both the Esquimalt Waterworks Co. and the city desiring to make use of its waters; nor did it prescribe any time within which the city must assert the intention of exercising their right to acquire the plaintiffs' rights in Goldstream.

In May, 1892, the plaintiffs began their operations on Goldstream. They cleared out the banks of the stream and erected dams for the purpose of making reservoirs, and increased the volume of available water, and took precautions to insure its purity.

They also constructed works by which the water could be, and was, led to the tramway company's power house, and there used for the purpose of generating power for the use of the tramway company; but, although they have abundant water for distribution, they do not employ any for any purpose, other than for the generating of power at this one place. The defendants seek to acquire this water, at a point below the power house, after it has done its work there, and before it reaches the sea.

It seems to me to be clear that, whatever the rights of the city may be to these waste waters which they propose to acquire without paying the Esquimalt Waterworks Co. for collecting them, the city have, under their Act of 1873, as amended in 1892, the right to acquire, by the compulsory powers contained in those Acts, the whole of the interest of the Esquimalt Waterworks Co. in the Goldstream waters. That seems abundantly clear, and, having regard to the pleadings, I think that a declaration on that point should have been made.

Now as to the acquisition of the surplus or waste waters, the question is more difficult.

The Esquimalt Waterworks Co., by their Act of 1892, acquired (subject, etc.) a license to take the waters of Goldstream. This privilege enabled them to appropriate waters in advance of their requirements, and possibly (see

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Wilts and Berks Canal Co. v. Swindon Waterworks Co., L. R. 9 Ch. 451) to supply water for power purposes to the tramway company; but does their Act of 1892 confer on them such a property or ownership in the waters flowing in the natural bed of the Goldstream river as to prevent any other person from acquiring that water under the provisions of the Water Clauses Act of 1897? That question must be answered by considering the objects which were contemplated by the Act of 1892, and the scope of the Water Clauses Consolidation Act, 1897. The preamble to the Act, after referring to the Water Privileges Act of 1892, goes on to say: "And whereas it is necessary and expedient at the present session, to provide for the due conservation of all water and water power so vested in the Crown as aforesaid, and to provide means whereby such water and water power may be made available to the fullest possible extent in aid of the industrial development and of the agricultural and mineral resources of the province: And whereas for the furtherance of the purposes aforesaid, it is expedient to enact an exclusive and comprehensive law governing the granting of water rights and privileges, and to provide and regulate the mode of acquisition and enjoyment of such privileges, and the royalties payable to the Crown in respect thereof."

The Act then provides for the appointment of a set of officials to whom (under the supervision of the Lieutenant-Governor in council) the administration of all the water by the Act vested in the Crown is committed.

Provision is made for the acquisition of water for ordinary domestic, agricultural, and mining purposes, and the supplying of water by waterworks systems to cities, towns, and unincorporated localities. As a consequence of the passage of the Act, the necessity of obtaining the sanction of the legislature by private bill is no longer necessary. The Act deals with the acquisition and expropriation of "recorded" water and "unrecorded" water. "Recorded" water is not defined, but we can learn what it is by reference to "unrecorded" water, which is defined as follows: "Unrecorded water" shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by public or private Act, and shall

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include all water for the time being unappropriated or unoccupied, or not used for a beneficial purpose."

Much reliance was placed by the counsel for the city on the words "not used for a beneficial purpose," and having regard to the preamble, and the scope of the Water Privileges Act, 1892, and Water Clauses Act, 1897, I do not see how the contention of the city that the waste waters of Goldstream are "not used for beneficial purposes" can be resisted, provided the Act of 1897 applies. It may seem unjust or unfair on the part of the city to avail themselves of all the work of the Esquimalt Waterworks Company, but that cannot affect the plain words of this section.

The question then is, whether the Act of 1897 is applicable?

By the Act of 1892, passed on 23rd April, 1892, that is, some weeks before the Esquimalt Waterworks Company made any appropriation under their statute, there was vested in the Crown the right to the use of all water in Goldstream.

The plaintiffs' Act of 1892 gave them power to divert and appropriate so much of the said waters as they should deem suitable and proper. If these two sections are compared, it will be seen how much more comprehensive is the language used in the public Act than that found in the private Act. In my opinion, the statute of 1897 was intended to control the acquisition and use of the waters not appropriated on or before 1st June, 1897. The rule that a later general Act shall not interfere with an earlier special Act is not being infringed. It is not in point. Their Act of 1892 did not give to the Esquimalt Waterworks Company the exclusive use of Goldstream water from its source to its mouth. Nor can they by taking possession of the source of the stream confer on themselves any greater rights than those conferred by the statute. Their Act merely granted a license to take what was necessary. By a public statute of the same date the Crown reserved to itself the rest of the waters in that stream, and in 1897 Parliament prescribed a method by which the right to use these waters, as well recorded as unrecorded, could be obtained, that is to say, by application to a commissioner, from whom, instead of from Parliament, a right to permanently divert water can be obtained. In making that

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grant the Commissioner must have regard to existing rights (s. 15). His adjudication is subject to revision by the Lieutenant-Governor in council (s. 42b). In short, he can take into consideration all those matters which the private bills committee would consider in dealing with a petition for a private bill. Under the scheme of the Act the Lieutenant-Governor in council can see that no injustice is done to the plaintiffs, and at the same time see that the waste waters are made available for the defendants' requirements.

For these reasons I would allow the appeal and set aside the judgment. The plaintiffs' application for an injunction should be dismissed. The defendants are entitled to a declaration that they have the right to take the unrecorded waters under the Water Clauses Consolidation Act, 1897; also the right to take the waters of Goldstream under the Act of 1873. After making these two declarations, it will be unnecessary to make any declaration as to the plaintiffs' rights.

MORRISON, J.:—The defendants, the city of Victoria, in 1905, invoked the provisions of part III. of the Water Clauses Consolidation Act, 1897, which deals, inter alia, with the supplying of water to cities, and posted notices of their intention to apply for certain records of the water of Goldstream. Thereupon the plaintiffs brought the present action, seeking to enjoin the defendants from further proceeding with those applications, basing their claim upon an exclusive right to the water of Goldstream, which they allege they have acquired from the legislature and riparian owners respectively, and which right will be invaded if the records sought are granted. They also seek a declaration of their rights as claimed.

In the year 1873 the legislature passed an Act dealing with the supply of water to the city of Victoria, then as now the capital of the province of British Columbia. The critical position of the municipality as to the quality as well as the quantity of the water previously supplied was declared to be before them, and an area contained within the radius of 20 miles of the city was designated, from which a supply could be obtained—a species of water preserve. Goldstream lies within that radius, but the city did not seek to utilize its waters until the application in 1905.

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In 1885 the Esquimalt Waterworks Company, the plaintiffs, were incorporated by special Act. The preamble sets out the objects to be, to construct, manage, and maintain waterworks, to supply the town of Esquimalt, the Royal Navy Dockyard, the Royal Naval Hospital, and the residents of a peninsula particularly described, but which does not include the city of Victoria, with the right to take water for that purpose from Thetis lake and Deadman's river.

By sec. 9 they acquired rights of appropriation of those waters, but of course only for the purposes for which the company were incorporated. By sec. 10, after appropriation, etc., the lands, privileges, and waters became vested in the company. The company exercised those statutory rights.

In 1892 the legislature had before them the whole question of the water rights within the province, for at the session of that year, the Water Privileges Act, being chapter 47 of the statutes of 1892, was passed, as well as a number of Acts incorporating waterworks companies, electric light companies, and power companies. The plaintiffs and defendants were both then before the legislature, as evidenced by the Act to amend the Esquimalt Waterworks Company's Act of 1885, chapter 51 of the Acts of 1892, and the Act to amend the Victoria Waterworks Act of 1873, being chapter 64 of the Acts of 1892.

The Water Privileges Act in its preamble states that the intention is to define and regulate the powers of companies incorporated under special Act, or otherwise, for constructing and maintaining waterworks and electrical works, and having power to divert, appropriate, and use streams of water for motive purposes. Section 2 enacts that the "right to the use of all water at any time in any river, watercourse, lake, or stream, not being a navigable river, or otherwise under the exclusive jurisdiction of the Parliament of Canada, was declared to be vested in the Crown in the right of the province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, etc., excepting under the provisions of this Act or some other Act already or hereafter to be passed.

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When this Act was before the legislature, the rights of the plaintiffs had not been extended to Goldstream. Doubtless the fact that the legislature proposed passing such an enactment being known to the plaintiffs, led them to secure the subsequent amendments of 1892.

The preamble to the company's amending Act of that year shews the intention of the legislature to be to give the company power to improve their waterworks system by an extension of their operations to Goldstream, and to divert and appropriate its waters for conveyance to the town of Esquimalt and the peninsula described in their original Act, but in secs. 1, 9, and 10, the rights of the city of Victoria in those waters are recognized, and those of the company are subordinate thereto.

Again, there does not appear in the amending Act any vesting clause similar to that in sec. 10 of the company's original Act.

The amendment to the City Waterworks Act passed also at this session, being chapter 51 of the Acts of 1892, does not cut down any rights given the city in 1873. In sec. 6 power is given the city to lay pipes and carry water through Goldstream district.

And by sec. 14 the city are prohibited from distributing water within the area where plaintiffs have the right under their Act to distribute water—thus again shewing the limits within which the plaintiffs are confined in their operations. Upon the passing of the amendment to their Act, plaintiffs purchased from the riparian owners on Goldstream their lands, and proceeded and built reservoirs, etc.

From 1892 until 1897 the legislature did not deal with the water question. In the latter year a comprehensive and exclusive law was passed, governing the granting of water rights and privileges, and regulating the enjoyment and use thereof, known as the Water Clauses Consolidation Act, 1897. Section 2 attempts to define "unrecorded water." Included in that definition is water "not used for a beneficial purpose." Doubtless water may be used beneficially in a number of ways, but in whatever beneficial way it is used, say by the plaintiffs, it must be in manner authorized by their Act of incorporation. The plaintiffs, not being a power company, are precluded from performing the functions of a power company. So that any use of the

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water of Goldstream by the plaintiffs, pursuant to their contract with the British Columbia Electric Railway Co., is ultra vires, and the water so used cannot be said to be used for a beneficial purpose. The trial Judge finds that no beneficial use is or was made of the Goldstream water except under their contract with the tram company in 1898. That the legislature did not intend to confer any such power upon the plaintiffs as they are exercising on Goldstream, seems to me manifest.

The doctrine of ultra vires as enunciated in Attorney-General v. Great Eastern R. W. Co., 5 App. Cas. 481, was followed in a very recent case, Attorney-General v. Mersey R. W. Co., decided by the Court of Appeal on 5th December, 1906, and reported in 23 Times L. R. 129. That principle is "that where there is an Act of Parliament creating a corporation for a particular purpose, and giving powers for the particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited." And Vaughan Williams, L.J., in the latter case, says: "You ought to give a wider construction to the words of a memorandum of association creating and defining the powers of a purely commercial company having no compulsory powers and no monopoly, than you would give to the words of a statute creating a company like a railway company, having compulsory powers of land purchase and a practical monopoly."

Were the plaintiffs' contention to prevail, the company would have a practical monopoly.

Applying those principles to the company's "charter of rights," it must be held to be confined to the main purpose of the Act, and restricted in its operation to the area defined thereby. The supplying of water from Goldstream to an electric tram company to enable them to operate their line of railway beyond those prescribed limits is, to my mind, clearly ultra vires. (Vide secs. 15 and 24 of the plaintiffs' Act, 1892.)

If this view be right, and coupling it with the fact that the plaintiffs have made no use whatever of the water of Goldstream for a period of 13 years, i.e., from 1885 to 1898, I cannot discern what status they have to seek an injunction, or even a declaration of their rights in this respect. The legislature has made ample provision for the

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protection of the public as well as private corporations in circumstances such as exist in this case.

True, the company, instead of exercising their powers of expropriation in respect to Goldstream, purchased the riparian lands, and therefore claim to have acquired an absolute right to or property in the water.

The purchase of lands gave the company no greater rights than the owners possessed, viz., the right to the uninterrupted, undiminished, unpolluted flow of the water past their lands, so that it could be enjoyed for the purposes incidental to their ownership. The company purchased those lands solely by virtue of the limited authority given them by their Act of incorporation, and for no other purpose, however varied the other purposes to which the lands and water could otherwise be put.

The position of the company, as compared to that of the riparian owner, as to the use of the water, is reversed. The riparian owner had the water as an incident to his right to the land. The company have acquired the land as an incident to their right in the water. But in the present case, those incidental rights in this particular water are subject to that of the city. The rights of license claimed are not absolute and exclusive as against the defendants. The company in dealing with realty are restricted to the acquisition of such lands as may be required for the purposes contemplated by the legislature: Duke of Devonshire v. Pattinson, 20 Q. B. D. 263; The Queen v. Robertson, 6 S. C. R. 53, 94, per Gwynne, J.

In the view I take, the waters of Goldstream are "unrecorded waters." It follows that the city may apply under the provisions of the Water Clauses Act for a record of water in Goldstream. The Commissioner, in considering that application, must have regard to all the circumstances intended by the legislature, including any rights of the plaintiffs there. The city, in making this application, are, in my opinion, pursuing just such a course as was contemplated by the legislature in passing the Water Clauses Act, viz., complying with the obligation to recognize the right of the legislature to preserve their departmental supervision over the disposition of such an important public utility as water. The state of the law before 1897 respecting water was unsatisfactory, and by passing the Water Clauses Consolidation Act the legislature attempted to remedy existing

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defects therein. They must therefore be held to have intended to limit existing companies very strictly to their corporate powers.

I would allow the appeal.

HUNTER, C.J. (dissenting), was of opinion that the judgment below should be affirmed with a variation as to the counterclaim.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

EMPIRE MANUFACTURING CO. v. LEVY.

Discovery—County Courts—Better Affidavit of Documents—Production of Books—Discretion—Appeal—Relevancy of Documents to Issue.

Appeal by defendant from an order of the Judge of the County Court of Kootenay, in an action in that Court, requiring defendant to file a further and better affidavit of documents. The action was brought upon a guarantee signed "L. Levy & Co.," under which name, it was said, Rebecca Levy carried on business. An affidavit of documents was made by her, which the plaintiffs deemed insufficient.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

J. A. Macdonald, K.C., for defendant.

A. H. MacNeill, K.C., for plaintiffs.

MARTIN, J.:—In the first place, and in general, I am satisfied that a County Court Judge has no greater power over affidavits of documents under Rule 237 of that Court, than a Judge of this Court has under the corresponding Rule 354.

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In the one case the Judge makes such order "as may be just," and in the other, "as may . . . in his discretion be thought fit." The language means the same thing.

Then as to this particular case. On 22nd October, 1905, the defendant was examined for discovery, and on 27th June following made (pursuant to notice dated 18th May), an affidavit of documents, and, after the order of 10th July last, made a further affidavit, dated the 13th of that month, but now appeals from the order of 27th July directing a still further affidavit. The validity of that order depends primarily upon the issues, because it is admitted that there are in existence the usual business books of the defendant firm, apart from any question directly relating to the guarantee which gave rise to this action. If the only issues were the scope of the authority of the defendant Rebecca Levy's husband, and her ratification, then I am of the opinion that the order could not be supported. But there is another issue quite as important and more difficult, viz., was the husband not only the manager but also a member of the firm, despite the fact that Rebecca Levy was at the time the sole person who was registered as carrying on business under the name of the defendant firm, as set up in paragraph 7 of the dispute note?

To determine this issue, which is necessarily involved in the allegations contained in the plaint and dispute note, and is sufficiently raised without the necessity for a reply, there being no counterclaim (see County Court Rules 161, 178, 180), the ordinary business books of the firm would be liable to inspection to shew who in reality were its members by disclosing the manner in which they had dealt with each other. From this point of view, which was not perhaps clearly brought out on the argument, I think the order must be supported, quite apart from any question as to the sufficiency of the affidavit in other respects, because on this head, or issue, there is so far really no affidavit at all, though the plaintiffs are entitled to it. The affidavit of 13th July is frankly restrictive in its scope, and drawn to meet two issues only.

It follows that the appeal must be dismissed.

MORRISON, J.:—As appears from the material before us, Rebecca Levy alleges that she carries on the business of a

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tobacconist at Rossland, B.C., under the firm name of L. Levy & Co. The business has been and is carried on under the entire management and control of Rebecca Levy's husband, L. Levy, together with his two sons—Mrs. Levy attending mainly to her household and domestic duties.

The plaintiffs are manufacturers of shorts in the city of Montreal, and claim the sum of $361.01 from the defendant under the guarantee set out below, viz.:

"Rossland, B.C., Oct. 22nd, 1903.

"The Empire Mfg. Co., Ltd., 646 Craig St., Montreal, Que.

"Gentlemen.—We hereby guarantee the account of B. Bennett for goods shipped to him either at Rossland or Fernie for the sum not exceeding six hundred and fifty dollars. In consideration of which we are to receive from you a commission of 7 1-2 per cent., seven and one-half per cent. on the dollar after his notes are paid. Yours truly, L. Levy & Co."

Rebecca Levy denies any personal knowledge of this document and transaction, and she made an affidavit of documents, from the schedule to which it appears that there was no reference to any books of account of the defendant firm. The plaintiffs then applied for an order that the defendant should file a further and better affidavit of documents, and in support of this application the plaintiffs' solicitor made an affidavit in which he alleged that similar transactions to the one in question had taken place between the parties hereto, and that commissions were paid by the plaintiffs to the defendant for other sales made similarly to this alleged one—and that he believes the defendant keeps books of account in which entries are made which are material to the issues in this action, particularly as to the composition of the firm. The learned Judge made the order sought, from which order the present appeal arises.

The only point in my opinion involved turns entirely upon this, whether the learned Judge has discretionary power under Rule 237 of Order XVII. of the County Court Rules, and if so whether he properly exercised it. That Rule is in the words following: "Any party to a cause or matter may, by notice in writing, require any other party to make discovery

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on oath of the documents which are or have been in his possession or power relating to any matter in question therein. If the party on whom such notice shall be served shall neglect or refuse to make such discovery within 5 days after service of such notice, or such further time as the Court may allow, or if the party serving the notice shall deem the discovery given unsatisfactory or insufficient, he may apply to the Judge in respect thereto, and the Judge may, on such application, make such order in the matter and as to the costs of such application as may be just."

Having regard to the pleadings, affidavits, and evidence produced on appeal, I have no manner of doubt but the order for a further and fuller discovery is right. The cases cited by counsel in support of the appeal turned on Rules quite different from that pursuant to which the Judge here made his order. The privilege of questioning the opposite party on discovery is most essential in the proceedings in an action before trial, the omission of which may result in disastrous consequences. It is permitted to be most inquisitorial, and though it would seem that answers to interrogatories are conclusive, yet an affidavit as to documents is not necessarily so. That is substantially all that Jones v. Montevideo Gas Co., 5 Q. B. D. 556, decides. In interrogatories the deponent swears to what he knows: in an affidavit of documents he swears to the relevancy of the documents, as to which he may be in error. Morris v. Edwards, 15 App. Cas. 309, upholds that case.

In White v. Spofford & Co., [1901] 2 K. B., 70 L.J.K.B. 658, the question turned exclusively on the word "specific," which appears in the Rule there considered, and which is not in Rule 237 of the County Court Rules. It seems quite clear from the judgments of their Lordships of Appeal in that case, that had the word "specific" not been inserted, they would not have disturbed the order appealed from, which was made in circumstances very similar to those in question here.

I would dismiss the appeal.

IRVING, J., dissenting, was in favour of allowing the appeal, for reasons stated in writing.

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BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

PHILIP v. BAUER.

Principal and Agent—Agent's Commission on Purchase of Land—Agent Bringing Vendor and Purchaser together—Negotiations Broken off—Subsequent Renewal and Conclusion at Higher Price without Intervention of Agent.

Appeal by defendant from judgment of MORRISON, J., at the trial, in favour of plaintiff.

The action was brought by an estate agent for commission on the purchase by defendant of a block of land in North Vancouver.

The appeal was heard by HUNTER, C.J., IRVING, J., MARTIN, J.

Burns, for defendant.

L. G. McPhillips, K.C., for plaintiff.

HUNTER, C.J.:—As usual in cases of this sort, the law is well enough settled, and the only difficulty is in its application to the facts.

The plaintiff admittedly brought the defendant into negotiation with the vendors, Robert Ward & Co., and on 8th May, 1905, the defendant offered Ward & Co. $40,000 for the property, to which the latter on 17th May, made a counter offer of $50,000, giving the defendant till the 24th to accept or reject. In the meantime the plaintiff had informed the defendant by letter that his commission would be 2 per cent.; and I gather from the terms of the letter that he meant 2 per cent. on the price, whatever it was; but the defendant says that, while he never disputed the percentage, he assented only on the terms that the property could be secured for $40,000, although he would have given it on a figure not to exceed $45,000, especially as he thought he could get some

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concessions from the municipal council, through the plaintiff, who was clerk to the municipality.

On 4th June the defendant notified the plaintiff by letter that he would not pay $50,000, and that, so far as he was concerned, the deal was off; and he had verbally notified the plaintiff to the same effect two days before the option expired.

The defendant himself renewed the negotiations and did purchase the property in the middle of the following October for $50,000, and thereupon the plaintiff claimed a commission of 2 per cent.

The defendant refused to recognize any claim for a commission, alleging that it was an independent transaction, and that he bought at the higher figure, as values had considerably advanced in the locality since the negotiations in May; and the plaintiff admits that there were a good many sales. In this contention I think the defendant is correct, as it is clear that the old negotiations came to an end early in June, and that the plaintiff had no part in the new negotiations; and it is not suggested that the transaction was delayed in order to defraud the plaintiff out of his commission.

The law is clear that to entitle the agent to a commission, he must have been the proximate, or, as it is sometimes better put, the efficient cause of the sale; and it does not follow because he originally brought the parties into communication with each other, that that of itself entitles him to a commission.

I would therefore allow the appeal.

IRVING, J.:—To earn his commission, the plaintiff undertook to bring the defendant and the seller to an agreement. They were to come to an agreement, and he was to bring that agreement about. It does not mean, of necessity, that he should be actually present when that agreement is concluded and all the details are arranged, but he must be able to shew that his efforts led to the negotiations which resulted in the agreement. His commission depends upon their agreeing together.

The broker's authority may be limited, e.g., to purchase for a certain amount, or within a definite period; in the absence of any arrangement, his authority may, subject to the ordinary requirements of good faith, be revoked.

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I can see no reason to doubt the bona fides of the defendant in writing the letter of 4th June, 1905. In my opinion, that letter put an end to the contractual relation which, according to Toulmin v. Millar, 58 L. T. 96, is necessary to found a legal claim for commission.

I admit that the principal cannot by breaking off relations with his agent defeat his agent's right to commission, where the agent, who has been employed, has already before the revocation done all that is necessary to earn it, but in this case the commission had not been earned on 4th June, 1905.

MARTIN, J.:—The question before us on this appeal is almost entirely one of fact, and I see no reason for disturbing the conclusion reached by the trial Judge.

The appeal should be dismissed.

Appeal allowed; MARTIN, J., dissenting.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

SULIN v. JARVINEN.

Principal and Surety—Guarantee—Consideration—Statute of Frauds—Waiver—Assignment for Benefit of Creditors.

Appeal by defendant from judgment of HENDERSON, Co. C.J., in favour of plaintiffs in an action upon a guarantee.

The appeal was heard by IRVING, MARTIN, and MORRISON. JJ.

J. E. Bird, for defendant.

Bowser, K.C., for plaintiffs.

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IRVING, J.:—The defendant is or was the manager of a company (composed of Finlanders) called the Kalevan Kansa Colonization Company, Ltd. He held a mortgage on the assets of the company for two-thirds of $7,500.

The plaintiffs are Finlanders, and are or were in May, 1904, unable to speak English.

In that month the plaintiffs and defendant came to Vancouver. The defendant bought a lathe from the Fairbanks Company for $447. He says he bought it for the company; the plaintiffs say he bought it for them. They say that they handed him $500 to make the purchase, the difference, $53, was to be applied in the purchase of tools.

The defendant's story is that the $500 was to be applied as follows: $300 on account of the lathe, and $200 for some belting. As a matter of fact, the whole $500 was applied on the company's account, and a lien note given by the company for the lathe.

The plaintiffs had possession of the lathe, and did not learn until September, 1904, that the lathe had not been paid for. Some time after this, I cannot say when, as no dates are given, the lathe was seized by the Fairbanks Company, or their assignees. Later the Kalevan Kansa Colonization Company assigned to the Dominion Trust Company, subject, however, to the defendant's mortgage; upon this he received 75 cents in the dollar. The plaintiffs have received nothing.

Shortly after the plaintiffs learned that the lathe was subject to this lien note, Jarvinen was interviewed by one of them. What happened at the interview we do not know, but as a consequence thereof Jarvinen signed a paper of which the following is a translation: —

"To Brothers Vaino Hjalmer and John Sulin.

"The Kalevan Kansa Colonization Company, Ltd., acknowledge of being in debt the price of one iron lathe bought from the Fairbanks Company for four hundred and forty-seven dollars ($447.00) which money is received 25th May, 1904.

"Kalevan Kansa C. Co.,

"per A. Jarvinen, Manager."

"For above mentioned debt $447.00 I the with named A. Jarvinen will go in lawful security, with the mortgage which

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I have 2-3 of the machinery in the Kalevan Kansa Colonization Company Sawmill for $7,500.00.

"Andrew Jarvinen."

Upon this guarantee the plaintiffs on 1st December, 1905, brought this action against the defendant as surety for the sum of $447 owing to the plaintiffs by the Kalevan Kansa Colonization Company.

The defendant set up the following defence:—

1. That he did not on 23rd June, 1905, or at any time, make a guarantee in writing to the plaintiffs, in respect of an indebtedness of $447 or any sum of the Kalevan Kansa Colonization Company, Limited, to the plaintiffs.

2. And in the alternative, if it should be found that any such guarantee was given by him to the above named plaintiffs, that the said guarantee was given without consideration.

3. And the Statute of Frauds.

He applied at the hearing to amend by adding the following: 4. Plaintiffs released the defendant and waived their rights, if any, against him by assenting to an assignment for the benefit of creditors by the Kalevan Kansa Company, Limited, to the Dominion Trust Company, Limited, and extending the time for payment of the debt by the said Kalevan Kansa Company, Limited. This amendment was not allowed.

The grounds of appeal raise a number of questions not raised by the pleadings; with those I do not propose to deal. There remain, however, the second and third grounds. The second is that there was no consideration for the alleged guarantee.

In Crears v. Hunter, 19 Q. B. D. 341, an action brought on a promissory note, the defence being that there was no consideration for the making of the note, no evidence was given as to anything being said at the time of signing the note. The Judge at the trial, A. L. Smith, J., told the jury that if the note was signed by the defendant in order that the plaintiff might give time to defendant's father, and the plaintiff did give time, there would be a good consideration for the making of the note by the defendant. On appeal Lindley, L.J., said: "Looking at the document and the history of the transaction, I cannot invent any rational theory by which to account for the defendant's giving the note, except that

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it was for the purpose of benefiting his father by procuring for him time to pay the debt. To say otherwise appears to me inconsistent with human nature and the whole character of the transaction. It may be that there is no evidence that the defendant actually said that he would be liable, if the plaintiff would give his father time. But, except on the theory that such was the understanding between the parties, the defendant's conduct is inexplicable. I cannot think that there was no evidence for the jury that there was forbearance by the plaintiff at the request of the defendant. On the contrary, the evidence to the effect that there was seems to me overwhelming."

Then the same case is an authority for the proposition that where the guarantor requests the creditor to forbear from suing, and the creditor on such request, although he does not at the time bind himself to forbear, does in fact afterwards forbear to sue, there is good consideration for the guarantee.

That case was followed in Creelman v. Stewart, 28 N. S. R. 185.

Here there is evidence of an implied request, and actual forbearance, and so consideration for the contract.

Then as to the fifth ground of appeal, "that the judgment provided for a different cause of action than as set forth in the pleadings, of which defendant had no notice, and without amendment."

This ground is based, so we are told, on the decision of this Court in King v. Wilson, 11 B. C. R. 109. I do not see how that decision can affect this case. There the defendant's counsel raised at the trial the point that the pleadings were being departed from, and refused to call evidence on that ground. Here we have had no objection whatever, but a full trial on the only ground arguable raised in the pleadings.

In my opinion the appeal should be dismissed.

MARTIN, J.:—The principal question raised herein is on the point of consideration for the guarantee. I must say it seems unfortunate in this relation that only one of the plaintiffs was called, and we are asked to decide this case without the evidence of the other, though it is stated that he was the one who saw the defendant, who "got scared and he signed the paper." As opposed to this scanty and at best

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secondary evidence, we have the defendant's statement that he signed at the request of Makela (a friend of the plaintiffs) when no one else was present. So neither the evidence of the brother, nor of Makela, is before us to enable us to determine precisely what happened on this most important occasion, nor is any explanation offered for so remarkable a deficiency. There is, however, this to be said about the matter, that if the defendant deceived the plaintiffs about the payment of the $300 to the Fairbanks Company, and the payment of the $147 balance, or was negligent in protecting their interests at the time of purchase by seeing that the credits were properly made, he would be liable to account to them therefor on this being discovered, and if such were the case there would be ample consideration for his giving the guarantee instead of making payment forthwith. Apparently this must have been the view of the trial Judge, because otherwise his judgment, in my opinion, cannot be supported. The very fact that the defendant signed the guarantee without demur upon Makela's request would go to shew that there was some valid consideration therefor, and it is to be remarked that his own evidence is defective on this point and does not explain the matter satisfactorily.

As regards the second point, that the plaintiffs agreed to give 3 years' time to the company at the creditors' meeting after the assignment, there is no evidence to support that contention except the defendant's, and it is contended that it is not definite enough to bring such an agreement home to them, for Makela is not shewn to have been authorized on that occasion to represent the plaintiffs, in which I agree.

On the whole case, with some hesitation, I can only conclude that since it was fully open to the trial Judge to find on the facts as he did, I cannot in such a doubtful case see good cause for disturbing that finding, though I feel bound to say that in an action of this difficult nature I should have been much assisted if he had given even a brief note of his reasons for judgment. Sichto says that the defendant stated that "the company (not as plaintiff says, the defendant) would pay the balance (i.e., $147) in three months." Then was the proper time for the plaintiff Vaino Sulin to express dissent to this arrangement, but he did not. I mention this feature particularly, because, if I were satisfied that the defendant had acted fraudulently in the matter, I should be

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justified in drawing more unfavourable inferences against him than I feel warranted in doing.

The appeal should be dismissed.

MORRISON, J., concurred.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

CANADIAN BANK OF COMMERCE v. LEWIS.

Fixtures—Safe Built into House—Landlord and Tenant—Agreement—Change of Ownership—Removal of Safe.

Appeal by defendant from judgment of HENDERSON, Co. C.J., in favour of plaintiffs in an action to recover a safe, or the value thereof.

The appeal was heard by HUNTER, C.J., MARTIN, J., MORRISON, J.

J. A. Russell, for defendant.

Davis, K.C., for plaintiffs.

HUNTER, C.J.:—In 1887 the plaintiffs' predecessor in title, the Bank of British Columbia, rented a wooden building, in which the safe now is, and the then owners, the Canadian Pacific Railway Company, at their request built a brick vault for the purpose of the bank's business. The vault was built down through the floor to the ground, and a cement foundation was constructed for the safe, on which it rested of its own weight. The vault was built around the safe, and the latter could not have been removed out of the building except by taking away enough of the brickwork around the door of the vault to permit of its removal, and also by making a sufficient opening through some wall of the building, no doorway being wide enough for the purpose.

About the end of 1888 or early in 1889, the Bank of British Columbia vacated the premises, leaving the safe inside

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the vault, but it is alleged that they had an arrangement with the Canadian Pacific Railway Company by which they could remove the safe on making good all the damage. There does not appear to have been anything in writing about it, but I see no reason to doubt that the arrangement existed. The bank also instructed their agents to procure a purchaser, but without result.

About 1889 the vault was pulled down by agreement between the then tenants and the Canadian Pacific Railway Company, and a mezzanine floor or gallery put across the end of the store, which now partly rests on a prop which stands on the safe. These tenants used the safe from the time they went in, in 1891 or 1892, until they left in 1901.

In 1903 the defendant purchased the premises from the railway company through agents, but had no negotiation or arrangement with the vendors about the safe, which has always remained on the concrete foundation.

It is not seriously disputed that, in addition to making an opening in the wall of the building wide enough to permit of the safe being taken out, the floor would have to be materially strengthened, as it weighs about three tons, and the gallery would have to be taken down or re-propped.

There can, I think, be no doubt that the safe when enclosed in the vault became a fixture, and has remained such ever since, as it is impossible to remove it without tearing out some portion of the building. It seems to me hopeless to contend that it could be taken under a fi. fa. goods or that a chattel mortgagee of the tenant could insist on removing it against the landlord's objection.

Although the safe became a fixture, the bank could of course remove it, with the consent of the railway company, as long as they were the only parties to deal with, but I think the right to remove it under the agreement was lost when the next tenant took possession; or at any rate when the defendant bought the premises. It is not pretended that she in any way recognized any right in the plaintiffs in respect of the safe when she bought, and any arrangement between the railway company and the bank, not assented to by her, could not, of course, bind her.

The appeal should be allowed and the action dismissed.

MORRISON, J.:—I agree.

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MARTIN, J.:—On the two points of the sufficiency of the transfer and the Statute of Limitations, I have no doubt that they should be decided in favour of plaintiffs. But, as regards the safe, I share the opinion of Mr. Justice King in a somewhat similar case, Haggert v. Town of Brampton, 38 S. C. R. 174, that "it is impossible to feel confident on such a question." However, after perusing the whole evidence and applying the tests laid down in the last mentioned case, and in Stack v. T. Eaton Co., 4 O. L. R. 335, 1 O. W. R. 511, I cannot bring myself to say that the Judge has reached a wrong conclusion on the particular circumstances of this case which must determine the annexation: Holland v. Hodgson, L. R. 7 C. P. 328; and therefore his judgment should be affirmed, for, substantially, the reasons given by him. I think that a good deal of weight should be attached to the removal of the vault round the safe in 1898, or thereabouts.

Appeal allowed, MARTIN, J., dissenting.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

PADULAROGA v. CANADIAN CANNING CO.

Negligence—Injury to Person—Ship—Collision with Moored Vessel—Impeding Navigation—Proximate Cause of Injury—Contributory Negligence—Warning—Liability of Owner of Ship—Damages.

Appeal by plaintiff from judgment of MORRISON, J., dismissing action for personal injuries alleged to have been sustained by plaintiff by reason of the negligence of an employee of the defendants.

The appeal was heard by HUNTER, C.J., IRVING, J., MARTIN, J.

Lucas, for plaintiff.

J. A. Russell, for defendants.

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HUNTER, C.J.:—The plaintiff was engaged as a labourer on a scow which was unloading rock close to one of the piers of a bridge which was being constructed for a railway company across False creek, near the city of Vancouver. The waters of False creek are navigable under two spans of the bridge, but at the time of the accident the northerly span was blocked by scows, while the fairway through the south span was partly blocked by mooring piles having been driven near each pier, and partly by the scow on which the plaintiff was employed.

The normal width of this fairway is 82 feet, but at the time of the accident was reduced by reason of the obstruction to about 64 feet, the scow projecting into the fairway about 10 feet and being moored to a pile.

About 2 p.m. of the day in question (1st February, 1905), the defendants' tug, with a barge loaded with coal lashed alongside, approached the south span on a flood tide, and, in attempting to get through, brushed against the scow, with the result that the plaintiff, who was at the other end on a boom stick, trying, in obedience to orders, to push the scow around, was crushed against a pile, and suffered severe internal injuries, and was laid up in the hospital for about 9 months.

It is undisputed that the weather was fair, and that when the captain of the tug came through the Cambie street bridge, at a distance of between a quarter and half a mile from the bridge in question, both spans appeared to him to be blocked. The captain says that when he approached within 300 yards of the bridge he saw that the south fairway was only partly blocked, and that he blew the whistle, slowed down, and finally stopped the engines, as he says, to give them a chance to do something. Drifting on, and turning a sharp curve as he got closer, he thought that the opening was wide enough to get through, and accordingly tried to get through; but in doing so, in order to prevent the tug from striking the northerly pier of the span, swung over and brushed the scow. He admits that he had not the same control over the tug as if she had been free of the barge; that the latter with her load weighed about 400 tons; and that while going ahead he could keep the tug approximately straight on her course, but when going astern the rudder would have no control whatever.

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He also says that the only men he could see were on the scow, and that he could not see the plaintiff on the boom stick; and that he had no idea that he was endangering either life or property in endeavouring to get through.

The opening was, as already stated, about 64 feet in width, while the tug and barge had a total width of at least 50 feet.

It seems to me that under these circumstances the captain put himself in a dilemma. Either the fairway was wide enough to get through without doing any damage, in which case he was an unskilful navigator; or, knowing that he was handling an unwieldy craft, over which he had very indifferent control, and that he had not a full view of the fairway, and that he had to turn a sharp curve to properly enter the passage, he should have stopped and made certain that it was safe to go on.

It was strenuously argued by Mr. Russell that the scow was in motion at the time of the accident; but, although the plaintiff was endeavouring to push the scow around, and it was apparently slightly shifted by reason of his efforts, I think it must be regarded as having been at rest, so far as concerns the tug's movements, just as much as a vessel riding at anchor, as the foreman says it occupied the same position on the return of the tug, and the captain made no point of it in giving his evidence.

The scow then being at rest, the law is clear that the tug was bound to avoid it if possible; and it avails nothing that the scow was lying partly in the fairway, as it was plainly visible to the tug for a long enough time to enable her to avoid it.

In the case of The Egyptian, 1 Moo. P. C. N. S. 373, Sir John Romilly in delivering judgment against the appellants, says: "The proximate cause of the collision was the breaking of the cable of the steamer as she was taking steps for the purpose of mooring for the night. In the High Court of Admiralty the plaintiffs, the owners of the schooner, gave no evidence; they rested on the fact that their vessel was at anchor; that its position was well known to those on board the Egyptian; and that the burthen of proof lay on the Egyptian to shew that the collision was the consequence of an inevitable accident. Accordingly the appellants have undertaken this burthen, and insist that the evidence establishes

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that the collision was caused by an inevitable accident, namely, the breaking of the cable," etc.

In the case of The Meanatchy, [1897] A. C. at p. 354, Sir F. Jeune, in delivering the judgment, says: "When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light," (here it was broad daylight) "it it obvious that she has a heavy burden cast on her to justify her conduct."

In The Batavia, 10 Jur. 19, Dr. Lushington says: "The presumption of law, where a vessel at anchor is run down by another, I take to be this: that the vessel running down the other must shew that the accident did not arise from any fault or negligence on her own part, and, for this reason, that the vessel at anchor has no means of shifting her position, or avoiding the collision; and it is the duty of every vessel, seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if it be practicable and consistent with her own safety, any collision. This is the doctrine not merely of maritime law, but of common sense; it is the doctrine which prevails on roads, where, supposing a carriage be standing still on the wrong side, it is no justification for another running against it, though the latter be on the right side. It is always incumbent on the person doing the damage, to shew that he could not avoid it, without risk to himself." See also the same case in 2 W. Rob. 407.

In an Irish case, The Secret, 26 L. T. at p. 673, Townsend, J., says: "Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. The defendant was bound in order to support a defence of inevitable accident to shew that everything was done which could and ought to have been done with safety to the Secret to avoid a collision with the Industry. Much controversy has been raised respecting the place where the Industry was run aground, but, whether her berth was properly or improperly chosen, I apprehend that it was the bounden duty of the Secret to avoid any collision whatever. This is the doctrine of maritime law; what particular measures should be taken depends altogether on the particular circumstances of the case."

See also per Dr. Lushington in The Victoria, 3 W. Rob. at p. 52; and the Lochlibo, ib. at p. 318.

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The same rule appears to be laid down in the Federal Courts of the United States.

In The Virginia Ehrman, 97 U. S. at p. 315, in delivering the judgment of the Court, Clifford, J., says: "Vessels in motion are required to keep out of the way of a vessel at anchor if the latter is without fault" (i.e. as I understand it, without fault contributing to the collision, such as having no lights at night), "unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame by shewing that it was not in her power to prevent the collision by adopting any practicable precautions;" and cites a number of English and American authorities.

In Plathner v. The F. & P. M. No. 1, 45 Fed. Rep. at p. 704, Jenkins, J., says: "Such action would possibly have proved inconvenient in the navigation of his vessel, in swinging her around the bend; but he had no right to avoid such inconvenience to the injury of another. He had no right to come into probable dangerous proximity. He had no right to take any chance whereby the property of others would be endangered."

It was urged that the scow was only slightly pushed or shoved aside, and that there was nothing in the nature of a collision. In my opinion, the law does not recognize any such distinction, except only in degree, and it would be unfortunate if the Court were to lend any countenance to the idea that a moving vessel may interfere, even in the slightest degree, with one that was at rest and escape responsibility for ensuing damage. The application of the maxim de minimis is quite sufficient to dispose of frivolous and vexatious actions, and would adequately protect those vessels which inadvertently come into contact with others at rest, and cause no appreciable damage.

Suppose that the tug had brushed against a yacht, and, although the yacht had suffered no damage, a man standing on a chair in the cabin trimming a lamp was knocked off and injured, could it be said that the gentleness of the collision would be a defence?

I think, then, that the captain of the tug had a plain course to pursue, which was to make certain that he could go through without doing any damage, and failing that, to delay his passage until it was safe to proceed, and to avail himself

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of his proper remedy by action if he was damnified by the delay in unblocking the fairway: Rose v. Miles, 4 M. & G. 101, 16 R. R. 405.

But, even if we consider that the scow was unlawfully impeding navigation, which, in my opinion, it was not proved that it was under the circumstances, and that for that reason there was a lower standard of duty imposed on the tug than if the scow were not projecting into the fairway, she was at least bound to use ordinary care and skill to avoid a collision, but I fail to see how it can be said that the captain who, with an unwieldy cargo, confessedly approached the passageway, which he saw was partly blocked, and whose real condition he did not know until he had actually started to enter it, when it would, in all probability, be too late to avert a collision if it proved to be too narrow, or his vessel was not under perfect control, used ordinary skill or care under such circumstances.

The general principle is that, even if the plaintiff is at fault, unless his fault contributes directly to the injury, he is not prevented from recovering against the defendant if the latter's negligence is the decisive cause of the accident: see, e. g., Davies v. Mann, 10 M. & W. 546; Mayor of Colchester v. Burke, 7 Q. B. 339.

It was argued that the plaintiff's injuries were too remote a consequence for which to hold the defendants responsible. It seems to me, however, that they were among the natural and primary, and not the remote secondary consequences of the collision—just as in the case of the yacht already suggested. The plaintiff was at his lawful work in connection with the scow, when hurt, and one of the consequences to be expected in the event of a collision was that some person who was at work on or close to the scow would be injured.

And I apprehend that there is no doubt that the defendants are responsible for the negligence of those in charge of the tug, but if authority is needed for this, I may refer to the judgment of the United States Supreme Court in The Atlas, 93 U. S. at p. 311: "Damage is sometimes said to be done by the ship, but that is a mere form of expression, the truth being that it is either done by the owner or by the master and crew employed by the owner, who is responsible

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for their conduct, because being employed by the owner, they are his agents."

Then as to damages. The plaintiff, as already stated, suffered very severe injuries, which laid him up for several months, and, according to his physician, whose skill or knowledge was not challenged, are likely to be followed by a permanent disability which would render him less fit for work than before. The medical expenses alone amount to $355; his earning capacity was about $50 per month; so that I do not think defendants would have any ground of complaint if the damages were assessed at $1,750.

I therefore think that the plaintiff is entitled to judgment for this amount, with costs here and below.

IRVING, J., concurred.

MARTIN, J.:—Since the facts herein are practically undisputed, I am quite at liberty to draw such inferences therefrom as appear to me to be warrantable, and in fact must do so because we are without the benefit of the reasons which governed the trial Judge in dismissing the action.

After reading carefully all the evidence in the appeal book, I have come to the conclusion that the master of the Bermuda did not in all the circumstances exercise reasonable care and caution; in other words, that he was negligent. He did use due care in regard to the safety of the tug and scows, but not in regard to those persons whom he saw at work upon the scow engaged in unloading rock from it to fill up the pier. The cross-examination of the master, mate, and deck-hand by Mr. Bird . . clearly brings out the fact that the master and mate knew the men were so engaged, and yet did not take sufficient precautions in the circumstances. I am satisfied that he did not blow his whistle more than once, and his statement that he "probably blew one long whistle, followed by two or three toots," is not sufficiently definite to carry conviction, particularly since he adds that it "is probable" that the men on the pier and scow did not hear it. The defendants' other witnesses only speak of one whistle, and at p. 50 the master conveys that impression. It was his duty in the dangerous circumstances, as suggested by counsel on p. 48, to have at least sounded such a prolonged succession of blasts as would have been sufficient to direct the attention of any reasonably careful man to the approach of the tug and

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her attached scow. The stopping of the engines and approaching by slowly drifting with the tide were not enough precautions to have taken, even though the fairway was obstructed to a greater extent than was necessary in the presumably lawful construction of the pier. Nor can I understand why he did not hail the men to make sure of their safety. His explanation that he had no idea that any one was so engaged that he could be hurt in brushing aside the scow is not satisfactory, because the circumstances put him on inquiry as to that very possibility.

I prefer to rest my decision upon this sound ground, for I am not at all prepared to subscribe to the extreme way the liability of the tug was contended for by appellant's counsel, viz., that simply because it touched the scow, when obstructing the narrow fairway, it was per se liable for all consequences, including those which it was impossible to foresee or contemplate. None of the cases cited supported such a far-reaching proposition.

The appeal should be allowed, but seeing that the appellant sues in forma pauperis, there should be no costs.

Appeal allowed with costs, and judgment for plaintiff for $1,750 with costs; MARTIN, J., dissenting as to costs.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

NORTON v. FULTON.

Trial—Withdrawal of Case from Jury—Cause of Action Existing when Action Begun—Provincial Secretary—Refusal to Submit Petition of Right to Lieutenant-Governor—Submission after Action Begun — Payment of $5 into Court with Defence—Right to Nominal Damages only—Functions of Trial Judge—Costs.

Appeal by plaintiff from judgment of MORRISON, J., dismissing an action for damages against the defendant, for

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that, being Provincial Secretary, he wrongfully refused to submit a petition of right to the Lieutenant-Governor. There was also a cross-appeal by defendant as to costs.

The appeals were heard by HUNTER, C.J., IRVING, J., MARTIN, J.

E. J. Deacon, for plaintiff.

Davis, K.C., for defendant.

HUNTER, C.J.:—The action is based on the provisions of sec. 4 of the Crown Procedure Act, the material part of which reads as follows:—

"4. The said petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he shall think fit, may grant his fiat that right be done."

The petition of right was in respect of the plaintiff's claim for the renewal of a timber license, which had been refused by the Chief Commissioner of Lands and Works, and was left with the defendant on 24th April, 1906, for presentation to His Honour.

The matter of the petition was brought up by the defendant in the executive council, which decided that it could not advise His Honour to grant his fiat, and a letter was sent to the plaintiff's solicitors to this effect on 2nd May, which also stated that practically the same matter had been before the council during the previous year, and that the council saw no reason to change the decision.

On 4th May, in answer to an inquiry by the plaintiff's solicitors as to whether the defendant's letter of the 2nd was to be understood as a refusal to submit the petition to His Honour, the defendant wrote in the affirmative. Thereupon a cause of action arose by reason of the defendant's refusal to submit the petition; and while, no doubt, His Honour would, in the ordinary course, have acted on the advice of his council and refused his fiat if the petition had been submitted, still there was the possibility that if the matter had been laid before him he might have taken the responsibility, which he could legally do, of refusing to act on the advice, and granted his fiat; so that, if the matter

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stood here, the plaintiff would have had a good cause of action for at least nominal damages.

The defendant, however, after the action was commenced, and the day before the delivery of his defence, viz., on 21st June, submitted the petition to His Honour, who refused his fiat; and the defendant with the defence paid $5 into Court to satisfy the plaintiff's claim. The plaintiff refused to accept this, but proceeded to trial, with the result that his action was dismissed, but the trial Judge gave him his costs up to the time of the delivery of the defence. In this I think the learned Judge was right. There is no time specified by the statute within which the Provincial Secretary is required to submit the petition; and, that being so, the statute must be construed as allowing a reasonable time within which to submit it. The Secretary, and the other members of the council, have other and just as important duties to perform as the submission of petitions; and the council have both the right and duty to tender their advice on the question as to whether the fiat should be granted; and, of course, before submitting the petition, it is necessary that they should have a reasonable time to consider the matter before offering their advice to His Honour as to what should be done. Therefore, it cannot be said that the defendant has unreasonably delayed the performance of his duty by not submitting the petition until 21st June; and if it had not been for his letter of 4th May, there would have been no cause of action.

The defendant, however, when he found that the plaintiff was insisting on the carrying out of a formality, as the event afterwards proved, quite properly submitted the petition, and, as he did so within a reasonable time after it was left for submission, he has satisfied the statute—if not the plaintiff.

The appeal should be dismissed.

MARTIN, J.:—Assuming that the plaintiff is right in his contention that before action brought there was such a refusal to submit the petition as would ground an action, nevertheless under Rule 282 the defendant has set up, and proved at the trial, that he did after action and before plea duly submit the petition, and with that plea he alternatively paid into Court the sum of $5 to answer damages.

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What is complained of is that, in such circumstances, the trial Judge did not let the jury pass upon the question of damages, for he took the view that the plaintiff had not made out his case, and therefore withdrew it from the jury and dismissed it, giving the plaintiff his costs up to the delivery of the statement of defence.

A new trial is asked for. Mr. Davis's contention is that the circumstances being such that it would be impossible in any event for more than nominal damages to be awarded, this Court will not direct such a new trial to be had, for it would only be going through a form and putting the parties to useless expense to require the jury to bring in at the direction of the trial Judge a verdict for nominal damages.

It is undoubtedly the fact that if a Judge were required to charge a jury on the question of damages according to the evidence in this case, he could only direct them that they should assess them as nominal, which means, as Mr. Justice Maule said in Beaumont v. Greathead, 2 C. B. 495, 499, "a sum of money that may be spoken of but has no existence in point of quantity." They are, he also says, "a mere peg on which to hang costs." The sum of one dollar has long been regarded in this Court as such damages: Woodbury v. Hudnut, 1 B. C. pt. II. 39, 1 M. M. C. 31. And in Beaumont v. Greathead the Court of Common Pleas in term refused to direct the jury to enter a verdict for nominal damages, because, even where the creditor was entitled to them for the detention of a sum of money, the acceptance by the creditor before action of the debt barred his action for such damages. There is much in the principle involved in that decision which supports the respondent's contention. It is an error to assume that in all cases the jury alone must dispose of the question of damages, and that the Court has no power at all over them. The case of Feize v. Thompson, 1 Taunt. 121, is a decision exactly in point, and in it the jury was unable to agree upon the proper proportion of a sum due to the plaintiff, but the Court in banc (Mansfield, C.J., Heath and Chambre, JJ.) decided that even where a jury refused to give any damages, because of lack of evidence as to the precise amount, nevertheless the Court could order a verdict to be entered for the plaintiff with 6d. damages; Mansfield, C.J., saying, p. 123: "If the Court can put themselves in the place of a

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jury and say what the damages shall be which the jury have failed to assess, that case (one cited by Heath, J.) appears to be rightly decided, and we may here follow the precedent which it establishes."

That case, with others to a similar effect, is considered in Wills v. Carman, 14 A. R. 656, at pp. 661-2, 669-70, which case was cited to us as one supporting the appellant's view, but, after a careful perusal of it, having regard to the exact circumstances of the case at bar, it does not do so, because they are such that the jury can exercise no discretion, but simply enter one only possible verdict according to direction. Such being the situation, I agree with Williams, J., in Dods v. Evans, 15 C. B. N. S. 621, that the "matter is to be looked at as if that had been done which might and ought to have been done, viz., the inquisition amended by adding a finding of nominal damages upon the second and third breaches."

So far as Wills v. Carman is concerned, I should add that, even if it were a direct authority on the point (which it is not, in my opinion), we would not be bound by it, but by the English cases cited. The judgments in it, however, are complicated and interwoven with the consideration of other special issues peculiar to libel actions, and I further note that Mr. Justice Patterson dissents from the two members of the Court above mentioned, while the fourth member thereof, Mr. Justice Osler, took still another view of the case, and did not think it necessary to consider the point before us. The uncertain nature of these judgments is pointed out by Mr. Justice Rose in Bush v. McCormack, 20 O. R. 497, 499.

This Court has in regard to juries already in effect applied the principle of assuming that what must inevitably be done in matters of formal procedure will be done, and therefore relieving suitors from the useless expense and delay of further employing its machinery unnecessarily. It was in effect so applied in the case of Yorkshire Guarantee, etc., Corpn. v. Fulbrook, 6 B. C. R. 270, wherein, instead of directing a new trial in a case where the jury had disagreed, the Court ordered judgment to be entered in favour of the plaintiff because the only substantial defence was fraud, and if that issue went back to be re-tried the ruling would have to be given which should have been given at the abortive trial, that there was no evidence to support

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it. In the case at bar the same direction would have to be given as regards any other damages except nominal. The decisions in Bryant v. North Metropolitan R. W. Co., 6 Times L. R. 396, and Allcock v. Hall, [1891] 1 Q. B. 444, may also be referred to. As Lord Justice Lindley said, at p. 447, "Nothing will be gained by ordering a new trial."

It follows from all the foregoing that the proper course for us to adopt is to refuse to order a new trial merely to assess nominal damages, and therefore this appeal should be dismissed. It is unnecessary to make any other order because the respondent's counsel does not ask for a formal judgment in his favour, but simply that by the refusal of a new trial the useless litigation should be put an end to.

Then as to costs. We were informed by respondent's counsel (and his statement was not contradicted) that there is a cross-appeal on this question, and he argued that the judgment was wrong in dismissing the action without giving costs to the defendant, while allowing the plaintiff his costs up to the time of the service of the statement of defence. So far as the latter direction is concerned, he cannot now complain because the counsel then appearing acceded to it at the trial. But, as regards the subsequent costs, which he did ask for, I see no good reason, with every respect to the trial Judge, why he should not have been given them. The only suggestion for that not having been done is because defendant is a public officer, but I cannot see that a different principle should be laid down for that reason; to do so would not, in my opinion, be "good cause." which is required by Rule 976. After the statement of defence was delivered, the action became a hopeless one except for the recovery of nominal damages, and more than enough to satisfy them were then paid into Court. The case is a stronger one than Richards v. Bank of British North America, 8 B. C. R. 209, wherein it appears I came to a wrong conclusion in depriving a plaintiff of his costs. Compare also Gibson v. Cook, 5 B. C. R. 534.

The cross-appeal should be allowed.

IRVING, J.:—It is conceded that the refusal of the defendant to submit the petition to His Honour gave the plaintiff a good cause of action, but it is said that the subsequent submission of the petition before the pleadings were closed, together with the payment into Court of $5,

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made the trial of the action unnecessary, frivolous, and vexatious, and that therefore this appeal is unnecessary and should be dismissed.

With every respect, I cannot see the matter in that way. The plaintiff's civil rights have been invaded: that invasion can only be compensated by damages, and as, in my opinion, the jury in a case of this kind could, if they thought fit—I do not say they should or would — properly award exemplary damages, it follows that the learned Judge should have permitted the case to go to the jury.

I would allow the appeal.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

JENNS v. KEITH.

Contract—Sale of Land—Agreement to Share Profits—Assignment of Share — Order for Payment of Money—Acceptance—Payment on Account—Sale on Credit—Non-existence of Fund—"Available"—Parties—Amendment.

Appeal by defendant from judgment of HENDERSON, Co. C.J., in favour of plaintiff in an action to recover $969.60, in the circumstances mentioned in the judgments.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

Hulme, for defendant.

Bowser, K.C., for plaintiff.

IRVING, J.:—By agreement, dated 20th January, 1882, defendant and one Spencer agreed as follows:—

"Witnesseth, that the party of the first part agrees to pay the dues on leases numbers 3, 4, 6, 7, dated 25th May,

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1892, containing 13,560 acres more or less, or as many of them as may be deemed advisable. And the party of the second part hereby agrees to convey or transfer or assign all his rights and interests thereto whatsoever to the party of the first part. The party of the first part, after selling any of the lots so conveyed, transferred, or assigned, shall be allowed at least $1 per acre as commission to her agent for any sale thereafter, deducting $1 per acre against moneys advanced, and interest at 8 per cent. per annum, on such money advanced, and any other legitimate expenses incurred. Then the parties of the first and second part shall divide equally such balance of money in hand. The true intent and meaning of this agreement being that the said parties of the first and second parts shall share equally in the net profits of any sale."

Pursuant to this agreement, Spencer conveyed to defendant, who paid the government $20,700.

On 10th March, 1902, Spencer, by his attorney in fact, E. A. Jenns, wrote the following order in favour of John A. Webster:—

"With reference to the agreement between me and you of 20th January last please pay all the moneys referred to therein to Mr. John A. Webster of New Westminster, as a settlement in full of my account."

Webster died, and Mr. E. A. Jenns, the plaintiff's husband, commenced an action against his executors—one of whom was Mr. J. C. Keith, the defendant's husband.

On 10th September, 1903, Spencer, by his attorney in fact, Alice M. Tovey, gave the following order to Mr. E. A. Jenns:—

"Out of the first available funds to be produced by the sale of my timber limits, please pay to Mr. E. A. Jenns the sum of $969.60, and his receipt for the same will be a sufficient discharge for that amount."

Mr. E. A. Jenns presented the order to the defendant's husband, Mr. J. C. Keith, who was attorney in fact for his wife, and by him it was accepted on 28th September, 1903.

Jenns says the order of 10th September, 1903, was given in settlement of his action against the Webster estate. Keith says: "I accepted the order of 10th September, 1903, at the request of the Webster family. Spencer is a

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relation of Webster's. I wrote out the order of 10th March, 1902; Jenns signed it; I have held it ever since."

On 21st December, 1905, Keith paid Jenns $100 on account of the order. Keith said he paid this before he knew how the accounts stood, and that as a matter of fact no money was ever payable on the order.

Jenns, on the other hand, says that Keith told him that the net amount coming to Spencer from the sale of the limits would be $36,000.

Jenns indorsed the order over to his wife, who, on 8th February, 1906, commenced this action.

The trial Judge gave judgment for plaintiff. He says in his reasons: "The payment of $100 is, in my mind, an admission of liability."

I do not think that the payment of $100 is at all decisive of the question in issue. The payment of that sum is explainable, and the explanation given was that it was made before the accounts were made up.

Passing over the fact that there was a previous assignment to Webster of all moneys which were to be payable to Spencer under the agreement of 20th January, 1882, and coming to the order of 10th September, 1903, we find that the order calls for the payment "out of the first available funds to be produced by the sale of my timber limits." "Available" must mean "available to me."

The sale took place about December, 1905. It was for $40,000, or $38,000 net, and included not only Spencer's limits, but certain other limits belonging to Keith himself.

Keith in making the apportionment allotted to the Spencer limits $31,040, and to his own $8,960. The terms were $2,000 cash, and the balance in 9 yearly instalments of $4,000 each.

There is no evidence to contradict these statements, except a statement by Jenns that Keith had told him that Spencer's limits would net about $36,000. Keith says Jenns has misunderstood him or is mistaken.

Now can any one say that there are funds available for the payment of this order? The acceptance by Keith on 28th September, 1903, proves nothing, as at that date the property had not been sold.

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Then does the payment of $100 establish anything more than this (if it establishes so much) that $100 has been received and is available? It cannot establish that the balance $869.60 has been received or is available.

The existence of the fund out of which the money is to be paid has not been proved. Mrs. Keith makes out an account shewing that the charges against the Spencer limits amount to $38,104, and that the amount received on their account is $31,040, leaving a deficit of $7,064.08.

It is contended that Keith had no power to sell for credit, and a passage from Hunter on Powers of Sale, p. 107, is cited in which it is stated that where credit is not expressly authorized by the instrument, it is not permissible for the mortgagee-vendor to give a term of credit for a greater sum than the amount due him. Assuming that that is correct as to the exercise of a power of sale under a mortgage (see Mendels v. Gibson, 9 O. L. R. at p. 102, 5 O.W.R. 233), I do not see the applicability of the rule to the document of 20th January 1902, by which a very large discretion was committed to the defendant.

Appeal should be allowed and judgment reversed.

MORRISON, J.:—I concur.

MARTIN, J.:—As regards the first order of 10th March, 1902, on which the appellant relies, that must, in my opinion, be considered as abandoned or non-effective, in consequence of the arrangement made with the executors of the Webster estate.

As regards the power of attorney, the language is wide enough to cover the transaction.

As to the amendment regarding the adding of Jenns as a plaintiff, it appears from the written argument handed in by leave to the trial Judge, that the formal amendment was applied for, and it must be assumed that if it was necessary it would have been made, for the defendant was not prejudiced in any way thereby, and this Court would take the same course.

Then as to the merits. The difficulty arises from the fact that Keith chose to sell on credit without consulting with or obtaining the consent of the other party concerned, instead of for cash, and I can find nothing in the agreement

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to warrant that course. He has also apportioned the gross proceeds in his own fashion, between his own limits of 6 square miles and those of the others. In this respect the case is very similar to that of Nagle v. Harbour Lumber Co., wherein this Court gave judgment on 9th January, 1906, not yet reported, and similar consequences follow.

The payment of the $100, which the learned trial Judge refers to, supports the view that it was the intention of the parties that the order was to have been paid without waiting for the balance of the purchase money: he seems to have accepted Jenns's version of what occurred when the payment was indorsed on the order.

There remains only the question of the amendment by adding Jenns as a party. It is clear that this was necessary because the order is in his favour, and there is no assignment thereof to the plaintiff, nor even a statement by Jenns that he obtained the order as her agent or on her behalf. It appears that the matter was brought to the attention of the trial Judge, and the amendment was asked for in the written argument, and it should have been made almost as a matter of form, because it is not suggested that the defendant would have been prejudiced thereby. Unfortunately, however, the Judge seems to have overlooked the point, for no notice is taken of it in his judgment, and no amendment has in fact been made, the situation therefore being somewhat similar to that in King v. Wilson, 11 B. C. R. 109, though not so serious, because in that case no amendment had been asked for. In the present circumstances, the Court should now, as prayed, supply the oversight and allow the amendment: but it was clearly the duty of the respondent to have called the attention of His Honour to the omission, and had the amendment recorded, for it was in her sole interest, and without it she cannot sustain the judgment in her favour, and hence, as a term of the amendment she must pay the costs of this appeal, otherwise, if this term is not accepted, and costs paid within two weeks, the appeal should be allowed. See on this point of liability for costs, even where the Judge goes wrong of his own motion, the judgment of the Ontario Court of Appeal in Mills v. Hamilton Street R. W. Co., 17 P. R. 74.

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BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST. 1907.

FULL COURT.

COEN v. NEW WESTMINSTER SOUTHERN R. W. CO.

Railway—Animal Killed on Track — Negligence—Fences—Liability—Adjoining Owners—British Columbia Law.

Appeal by plaintiff from judgment of IRVING, J., in favour of defendants in an action for the value of a mare alleged to have been killed on defendants' railway through defendants' negligence.

The appeal was heard by HUNTER, C.J., MARTIN, J., MORRISON, J.

Bowser, K.C., and W. M. Gray, for plaintiff.

Reid, for defendants.

HUNTER, C.J.:—The defendants were incorporated by ch. 36 of the statutes of 1887, B. C., which Act was amended by ch. 36 of the statutes of 1889. By sec. 6 of the last mentioned Act, secs. 194, 196, and 198, inclusive, together with others not material to mention, of the then Railway Act of Canada, being ch. 29 of the Railway Act, 1888, were read into the incorporating Act.

So far as material, these sections enact as follows:—

"194. When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway. . . .

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"2. A hurdle gate has proper fastenings if it is fifteen inches longer than the opening and is supported at each end by two upright posts:

"3. Until such fences and cattle guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals, not wrongfully on the railway, and having got there in consequence of the omission to make, complete, and maintain such fences and cattle guards as aforesaid.

"196. After such fences, gates, and guards have been duly made and completed, and while they are duly maintained, no such liability shall accrue for any such damages, unless the same are caused wilfully or negligently by the company or by its employees.

"198. The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when not in use; and no person, any of whose cattle are killed by any train owing to the non-observance of this section, shall have any right of action against any company in respect to the same being so killed."

The trial Judge was of opinion that the legislature must be considered to have imported the Eastern decisions with these sections, but, with great respect, I am unable to agree. I do not think that the expression "not wrongfully on the railway" means not wrongfully according to the law of Ontario or Quebec or Manitoba, but according to the law of British Columbia; and, as the defendants did not shew that the mare was unlawfully at large by reason of some local by-law, or that the plaintiff was guilty of negligence or misconduct, we must assume that she was lawfully at large, which she might be under the conjoint provisions of the Animals Act and the Fence Act.

So far as the evidence shews, the mare and colt could only have got on the railway at Morton's crossing, as this was the only one of the three in question that was not provided with gates on both sides of the crossing, the rest of the line being fenced on both sides. There was no fence or gate on the west side of this crossing, which was the side next the Clover Valley road, a public highway, and I think

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the only reasonable conclusion is that the mare and colt got on the track at this crossing and strayed southwards, after having crossed over a cattle-guard that was not sufficient to stop them. And I do not think the fact that the mare was moving north towards this crossing when she was struck is enough to rebut the inference that she got on at this crossing, as the approach of the train might easily have turned her north.

Now, Morton's crossing being a farmer's crossing and not a public crossing, the statute required it to be either fenced off or provided with the statutory gates on both sides. The statute does not require cattle guards at such places, and the fact that such were put in by agreement with Morton does not relieve the company from the obligation they were under to the plaintiff to provide a fence or gate on the west side of the crossing.

I gather from the evidence that $250 would be a fair estimate of the value of the mare, and I would enter judgment for that amount with costs here and below.

MORRISON, J., concurred.

MARTIN, J.:—To begin with, the question must be decided —how did the horse get on the railway track? The only inference fairly open to us from the meagre evidence is, to my mind, that drawn by the learned trial Judge, viz., that it got on from Morton's crossing.

This case, it is agreed, has to be decided on sec. 194 of the Railway Act of 1888, only, and not on the amendment thereof in 1890, ch. 28, sec. 2, which, as pointed out in the late case of Carruthers v. Canadian Pacific R. W. Co., 4 W. L. R. 441, at pp. 442, 443, 448, 451, has really changed the law. It is too late now to depart from the construction placed upon the original sec. 194 by the Manitoba cases of Westbourne Cattle Co. v. Manitoba and North Western R. W. Co., 9 Man. L. R. 501, and the Ontario decision of Rathwell v. Canadian Pacific R. W. Co., 9 C. L. T. Occ. N. 413, in the County Court of Renfrew.

And, though it was truly said by appellant's counsel at this bar that the trial Judge erred in saying that our provincial legislature knew in 1888 of the Westbourne and Ferris cases, the fact being that they were not then decided,

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nevertheless I think they should be followed for the reason mentioned by Chief Justice Howell in the Carruthers case, p. 442. At the same time I feel that the question is a doubtful one, and I can quite believe that if it were brought before a higher Court, and freer than we are to consider the authorities de novo, other views might prevail.

The result is that on our said section it must be considered that the duty on the defendant company to fence was one it owed only to adjoining land-owners. Now, it is admitted that the plaintiff is not an adjoining land-owner, and there is a 15 foot strip of Morton's property between the highway and the railway allowance, through which the horse obtained access thereto because of the lack of a gate. But to get over this point the appellant contends that the result of our British Columbia Animals Act, R. S. B. C. ch. 24, and the Fence Act, R. S. B. C. ch. 27, is to put him in as favourable a position as though the horse was there by permission of Mrs. Morton, who is an adjoining owner. On the other hand, it is urged that the effect of that section is to confer no rights upon the owner of the strayed animal, but simply that the trespass which in reality exists is condoned because the statute says that there shall be no penalty for it. It does not declare that it shall be lawful for animals to stray on to unprotected lands, but merely says if they are found there "no trespass shall be deemed to have been committed and no action for trespass shall be maintainable therefor." This seems to me to be the right view of the matter, because otherwise a land-owner finding a stray animal in his grain could not prevent it from doing further damage by driving it off. There is a well-known distinction between the sufferance of an unlawful act, and the existence of the right to recover damages therefor.

There remains then only the other point, that the circumstances here were such that the engine-driver was guilty of negligence in running down the horse, but, on the undisputed but incomplete facts of this case, that contention is answered by Canadian Pacific R. W. Co. v. Eggleston, 36 S. C. R. 641.

The appeal should be dismissed.

Appeal allowed; MARTIN, J., dissenting.

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BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

CROW'S NEST PASS COAL CO. v. MILLS.

Vendor and Purchaser—Contract for Sale of Land—Material Misrepresentations by Agent of Vendors before Contract Made—Defence to Action for Purchase Money—Pleading —Amendment.

Appeal by defendant from judgment of a County Court Judge in favour of plaintiffs in an action to recover the sum of $339.30, being the balance of purchase moneys due on an agreement for sale of land.

The appeal was heard by HUNTER, C.J., IRVING, J., MARTIN, J.

Davis, K.C., for defendant.

J. A. Macdonald, K.C., for plaintiffs.

HUNTER, C.J.:—The agreement was executed on 1st May, 1903, and calls for a total payment of $450, of which $150 was paid at the time of execution, the balance being payable in two equal instalments on 1st November, 1903, and 1st May, 1904. No payment other than the $150 has been made, and the statement of defence sets up misrepresentation dans locum contractui by plaintiffs' agent to the effect that plaintiffs would build a depot in Morrisey, where the land is situate, transport the miners back and forth to the mines from Morrisey free of charge, and build a large number of cottages in the town and rent them to the miners. Evidence was also received at the trial without objection as to misrepresentations about coke ovens, the agent, according to the defendant, stating that the company would build 500 coke ovens at Morrisey.

The trial Judge found that the agent made representations which were not carried out, viz., that 500 coke ovens

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would be built, whereas only 250 were built; that a station and freight shed would be built, whereas only a small shelter was built and no freight shed; and these findings have not been successfully impeached.

The Judge found that these representations were made after the bargain had been struck, and after the first payment had been made, but in this he seems to have fallen into a mistake.

According to the defendant, who appears to have been a credible witness, there were 3 distinct interviews with the agent, the first being when the defendant agreed to take the lot, when the representations about the coke ovens and depot were made; the second when he paid the $150, when no representations were made; and the third when he signed the agreement, when the representations about the station were made, as well as other representations which the Judge did not find to have been made.

But the Judge having found, in spite of the testimony of the agent, that the representations about the coke ovens were made, and the only evidence as to when they were made having been that of the defendant, it seems to me that his testimony that they were made when he agreed to take the lot must be accepted, and he also says that he would not have taken it if the agent had said that only 250 ovens would be built. There was therefore proof of a representation dans locum contractui which was not carried out, and therefore the action must fail.

IRVING, J.:—Plaintiff's action for $339.30 is based on a covenant contained in an agreement to purchase a lot in Morrisey, dated 1st May, 1903, entered into by defendant.

The defence is that the agreement was obtained by misrepresentations.

The following were the misrepresentations mentioned in the pleadings:—

(1) That Morrisey was to be the head office and chief place of business of the plaintiff company.

(2) That the plaintiffs would build a depot in said town, and carry the miners from the town to the mines and back free of charge; and that the plaintiffs would build in the said town a large number of cottages for miners, and rent them to the miners.

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During the trial, a third misrepresentation seems to have been set up by the defendants, and the plaintiffs apparently accepted the challenge; we must therefore assume that an amendment allowed at the trial to raise this third ground, viz., that the plaintiffs were to erect at Morrisey large coke ovens.

The County Court Judge gave judgment for plaintiffs, holding that, although as to building the ovens and the erection of a station there had been misrepresentations, these misrepresentations did not affect this agreement, as they were not made when the verbal agreement for the purchase of the lot was made.

The defendant, it would appear from the evidence, made a verbal agreement with Mr. Graham for the purchase of the lot in question, and paid him a deposit. Some week or so later, the document containing the covenant sued on was signed. At that interview the Judge finds that the misrepresentations as to the ovens and the depot were made, and procured the defendant's signature to the contract. I think the evidence establishes that representations as to the ovens and depot were made at the first conversation, before the deposit was paid.

The plaintiffs, by their reply, denied that Graham was their agent, and also denied that he made the representations. At both interviews Graham was the plaintiffs' agent. Graham says: "First conversation with defendant before day of sale, but told him I could not sell. Another conversation with Mills on 1st May." Cross-examined: "Began acting agent 1st May. Was employed by Tonkin (general manager) several weeks before that. Was during that time arranging preliminaries and advertising. For a month prior to sale was actively engaged." The learned trial Judge has found that the signature was procured by means of the representations as to the ovens and depot—that is to say, these representations procured the execution of the document sued on. With that part of his judgment I agree, but I think in writing his judgment he must have forgotten when these representations were made.

To this action, although brought as an ordinary common law demand, the defendant may set up any defence which would be open to him in an action for specific performance. It is well settled that a defendant may successfully resist specific performance by establishing that the plaintiff has

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not fulfilled some material representations, as to his own future plans or acts made by him at the time of and as an inducement for the contract: see Beaumont v. Dukes, Jacob at pp. 424 to 426, a case very much in point; and Lamare v. Dixon, L. R. 6 H. L. at p. 428.

I would allow the appeal and dismiss the action.

MARTIN, J.:—This is an action to recover an instalment of purchase money, with interest, due on a covenant in a contract to purchase certain lots in the town-site of Morrisey. In answer thereto, the defendant set up, by his amended pleading, three heads of misrepresentation by the plaintiffs as follows:

That they would (1) build a depot in said town of Morrisey; (2) would carry the miners from the said town to the mines and back free of charge; and (3) would build a large number of cottages in the said town and rent them to the miners.

Of these 3 it is contended by the respondents, and, in my opinion, rightfully, that only the first can be considered in this Court, because the trial Judge only found that one to be sustained. He did also find that there was a misrepresentation respecting the building of 250 coke ovens, but, as that was not set up in the pleadings, it is immaterial, and, with every respect, I cannot exactly see why he passed upon it at all, because there was nothing in the course of the trial so directed to that point as would justify a departure from the record, particularly in so strict a case as a specific allegation of misrepresentation. The circumstances are not similar to Scott v. Fernie Lumber Co., 11 B. C. R. 91, where the rule is applied that the issues may be limited by the conduct of the parties.

This leaves only the first head, and on it the evidence does not conflict, and it is that there is a building there which is used as a station and the trains stop at it. There is no description of it except that the defendant calls it "a shed to stand under to keep off the rain," but he does not even say whether it is open or closed, or give any idea as to what is wanting in its structure or conveniences, or give any other particulars (as he might easily have done) by which we may judge of its adequacy for such a small place. The plaintiffs' agent gives its measurements, and says it is

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what he represented—"I did represent as to building of station, and it is there, 25 or 30 feet long and 16 or 18 feet wide." The witnesses used the word "depot" or "station" in the same sense, and the complaint is merely that the defendant did not "build a depot"—simply that. But the fact remains that there is a passenger station there of some description, and the defendant has not, in my opinion, satisfied the onus cast upon him to shew its inadequacy. I do not think that the plan materially assists us in the matter; it simply shews the location of the passenger and freight buildings. It is admitted that no freight shed has been put up, but it is quite clear, to me at least, that the parties were directing their attention primarily to the passenger accommodation, and the defendant admits that plaintiffs' agent "told me nothing as to what sort of station would be built." Now, in the face of such loose and defective evidence, which might easily have been definite and precise, I cannot bring myself to decide in the defendant's favour by stretching a point to supply his deficiencies, and therefore, on my view of the practically undisputed facts, I think the appeal should be dismissed with costs.

Appeal allowed; MARTIN, J., dissenting.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

HALPIN v. FOWLER (No. 1).

Practice — Counterclaim — Amendment by Consent — Withdrawal—Dismissal—Costs.

Appeal by defendant from judgment of FORIN, Judge of the County Court of Kootenay, dismissing defendant's counterclaim to an action brought under the mining jurisdiction of the County Courts.

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The appeal was heard by HUNTER, C.J., MARTIN, J., MORRISON, J.

R. M. Macdonald, for defendant.

Davis, K.C., for plaintiff.

HUNTER, C.J.:—The plaintiff filed a plaint claiming to recover the sum of $562.40 as being the balance of moneys due under the terms of an agreement for his labour in extracting ore from a portion of the defendant's mineral claim. The defendant filed a dispute note, which, besides denying the claim, set up breaches of several of the covenants and conditions of the agreement; and the dispute note also contained a counterclaim for damages for breach of covenants to open and maintain in good repair, and to work the premises in a good and miner-like manner to his satisfaction. This dispute note was filed on 12th July, and on 16th July the defendant's solicitor wrote to the plaintiff's solicitor stating that he desired to amend the dispute note and counterclaim, as he had drawn them in a hurry to deliver them in time for the next sitting of the Court. The plaintiff's solicitor answered on 18th July that he was agreeable to the other filing such amended defence as he might deem expedient, and stating that he wished to amend the plaint, as the defence and counterclaim raised issues which should be disposed of, and which he could not plead as a counterclaim to the other's demand, and asked the other's consent to the amendment without an order.

To this the defendant's solicitor replied on the 19th consenting to the plaintiff's solicitor amending the plaint as he might be advised, he himself to have liberty to file an amended defence and counterclaim, and asking that the amended plaint be delivered as soon as possible, as the trial was fixed for 1st August, and he would have to confer with his client after receiving the plaint.

On the same day the defendant's solicitor wrote another letter stating that it occurred to him that the action ought to be transferred to the Supreme Court, giving his reasons, and asked if the plaintiff's solicitor would consent. On 25th July the plaintiff's solicitor filed his amended plaint. On the 26th, owing to a letter from the plaintiff's solicitor stating that he was ill, the defendant's solicitor wrote that he would have the trial postponed, and again asked if he would consent to the transfer to the Supreme

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Court. This request was again repeated on the 30th. On 1st August the plaintiff's solicitor wrote that he could not consent, giving his reasons. On the 2nd the defendant's solicitor replied that he would not move without the consent, and enclosed his amended dispute note, which did not include any counterclaim, and a cheque for the amount of the plaintiff's claim. To this the plaintiff's solicitor wrote inquiring whether the cheque was also meant to settle the counterclaim. The defendant's solicitor replied that he had started an action in the Supreme Court in respect of the counterclaim, and stated that he thought the plaintiff's solicitor would understand from the amended defence that he did not propose to proceed with the counterclaim in the County Court.

On 7th August the plaintiff's solicitor wrote stating that he would oppose any application to withdraw the counterclaim out of the County Court and would move to have it dismissed.

On the 9th the defendant's solicitor replied that he considered that under the arrangement he had the right to drop the counterclaim, and in order to put the matter beyond question enclosed a discontinuance. On the next day the plaintiff's solicitor acknowledged receipt of the discontinuance, and stated that it was on account of the counterclaim that he amended the plaint, and added a claim for damages to the claim for debt, and that his understanding was that the counterclaim was not to be dropped but amended. To this the defendant's solicitor replied that owing to the misunderstanding he was willing that the plaintiff's solicitor should take the cheque in satisfaction of the claim for debt, and amend the plaint by withdrawing the claim for damages, and counterclaim for the same in the Supreme Court, in other words, that he should receive the full amount claimed in the original plaint.

The plaintiff's solicitor did not accept this proposal, and the defendant's solicitor moved at the trial for leave to withdraw the counterclaim, bringing the correspondence before the learned Judge, and stated that he was not prepared to offer any evidence in support of it, which motion was dismissed; and on motion by the plaintiff's solicitor the counterclaim was dismissed with costs.

In so dealing with the matter, I think the learned Judge was wrong, for a variety of reasons. In the first place, there

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was no counterclaim before him to deal with. The parties had by consent substituted new pleadings for the original ones, and, although it is true that amended pleadings may not be filed in the County Court without leave of the Judge, the new pleadings were merely irregular and not nullities, so that the Judge could not disregard them ex mero motu suo, but could set them aside only on application by one of the parties. Nor can it be said that, because Mr. Macdonald asked leave to withdraw what did not exist, that gave the Judge any jurisdiction, because, as has often been said, it is the Judge's business to see through fallacies.

In the next place, I do not see how it can be open to doubt that the arrangement arrived at was anything else than the common everyday consent to amend the pleadings as the solicitor may be advised. A counterclaim is just as much part of the defendant's pleading as his defence, and it might just as well be argued that a solicitor could be held to a particular paragraph of his defence, as that he could be held to his counterclaim. The essence of such an arrangement obviously is that the parties are to begin de novo. and that the former pleadings are to be treated as wiped out.

In the next place, I cannot understand why a solicitor should be held to a pleading which he at once notifies the other side was filed without full consideration, and in a hurry to get the pleading in in time for the next sitting of the Court, when it is not pretended that there was any mala fides, or that any legal prejudice had been occasioned to the plaintiff which could not be compensated for by costs.

Then I am unable to follow Mr. McAnn's reasoning when he says he was prejudiced by the dropping of the counterclaim. Surely the defendant had the right, if he chose, to discontinue the counterclaim and seek his own forum, as the law allowed him to do, in which case the plaintiff could have filed any counterclaim that was open to him.

Then again, seeing that the parties were not ad idem, I fail to see the justice in Mr. McAnn being permitted to avail himself of the benefit of the agreement, and at the same time insist on the defendant being held to his own interpretation of it, to the defendant's disadvantage. It must be obvious that the proper course under such circumstances was that both should withdraw their amended plead-

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ings, and that each should be left to his rights as they existed before they were delivered.

Then again, I could understand the case being tried on either the original or the amended pleadings, although irregular; but it is somewhat novel to try it on an amended plaint which introduced a new cause of action, and the old dispute note, although an amended dispute note was before the Court and not moved against.

Other reasons might be given, but I think these are sufficient to dispose of this appeal, which should be allowed with costs, with a declaration that there was no counterclaim before the learned Judge for adjudication, while neither party should get any costs below.

The Judge gave as his reason for dismissing the counterclaim that there should not be multiplicity of actions, but I observe that in this action there has been multiplicity of appeals.

MORRISON, J., concurred.

MARTIN, J.:—In my opinion, we would not be justified in setting aside the order made by His Honour. The case to me is clear, and it is that since the counterclaim was originally properly on the files, it was incumbent on the defendant, when the day of trial came, to shew that it had been got rid of, either by the method provided by the Rules (which was not done) or by consent. So far as the alleged consent is concerned, I think the correspondence does not support the defendant's contention, and therefore he must fail.

The appeal should be dismissed.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

HALPIN v. FOWLER (No. 2.)

Contract — Construction — Breach — Mines and Minerals — Lease or License — Covenant — Timber — Damages—New Trial.

Appeal by defendant from judgment of FORIN, Judge of

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the County Court of Kootenay, in favour of plaintiff in an action under the mining jurisdiction of the County Courts.

The appeal was heard by HUNTER, C.J., MARTIN, J., MORRISON, J.

R. M. Macdonald, for defendant.
Davis, K.C., for plaintiff.

HUNTER, C.J.:—The amount involved in this appeal is not large, but the principles are important.

The defendant entered into an agreement under seal with the plaintiff, whereby he purported to lease a portion of a quartz mine to the plaintiff, the term commencing 22nd November, 1905, and ending 30th June, 1906; and among other covenants entered into by the plaintiff were covenants to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards; to remove all broken ore; and to sort out and preserve for shipment such material as could be profitably sorted, and place all concentrating ore on the dump as directed by the defendant; to work the area in a good and miner-like manner to the satisfaction of the defendant; and to insure by means of timbering, or stowage of waste, or both, as required from time to time by the defendant, the safety of the workings and their permanency, etc.

The plaint, among other things, seeks to recover damages from the defendant for preventing him from using the timber on the surface of the claim to do his timbering, for tearing up and removing the ore track and trestle alleged to be the only means provided for working the ore in question, and also for preventing the plaintiff from using the ore bins and track in connection therewith at the mouth of said level.

The defence was that the agreement of lease gave none of the rights contended for, and denied doing anything which prevented the plaintiff from carrying out his contract.

The trial Judge held as a matter of law that the plaintiff had all these rights under the instrument, and that he was denied their enjoyment, and left to the jury only the computation of damages, which they assessed at $400.

In so dealing with the case I think he was in error. The first thing to determine is the nature of the instrument. It is styled an agreement, and then purports to lease "for the purpose of mining and taking ore therefrom, that part of the property of the Whitewater Mines Ltd., described as fol-

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lows: beginning at a point in the roof and at the mouth of No. 6 level, thence westerly along the roof of No. 6 level 580 feet, thence upward and due north to the floor of No. 5 level, thence easterly along the floor of No. 5 level to the surface, thence downward along the apex of the vein to point of beginning, out of all of which area the lessor reserves a pillar six feet high up the dip from roof of No. 6 level, excepting such openings as may be necessary to gain access to the ground above such pillar."

It will be observed that only the length and the height of the area to be mined is given, and nothing is said as to the width, so that there is no defined area qua land of which exclusive possession is given. If, on the other hand, it was intended to demise the ore as it lay in situ for a certain distance and height of the lode, nothing would have been easier than to say so. But it is evident from the other portions of the instrument that the property in the ore was not intended to be given to the plaintiff, as he is to "sort out and preserve for shipment such material as can be sorted to a profitable grade," and place all concentrating "ore on the dump, as shall be directed by the lessor, such concentrating ore to become the property of the lessor;" and also "to remove to Whitewater station, the ore prepared for shipment, load the same into cars, and, using all diligence in this respect, ship such ore to such consignees as the lessor may from time to time direct, handing to lessor at the time of shipment, a copy of the shipping bill."

The defendant is also to receive the returns from all ore shipped, and is first to make certain deductions and keep certain percentages according to a scale from the amounts received, and then pay the balance to the plaintiff.

It seems to me that these provisions are inconsistent with the essential features of a lease whether of the land or the ore, i.e., exclusive possession, and it is perhaps needless to say that the presence of words of demise does not of itself determine the question, but the instrument is to be taken as a whole: see, e.g., Taylor v. Caldwell, 3 B. & S. 826. Further, the instrument cannot be construed as a license coupled with a grant, as the ore is always in the control of the defendant.

It seems to me, therefore, that the instrument is essentially nothing more than a contract to win the ore for a sliding percentage of the returns; and if this is so, then we need not concern ourselves with any question about implied cove-

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nants for quiet enjoyment, there being no express covenant of that sort in the document.

Now, the document is absolutely silent concerning the use of the timber, track trestle, or ore-bins which the plaintiff complains he was prevented from using. That being the case, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so what it was: see Lindley v. Lacey, 17 C. B. N. S., per Erle, C.J., at p. 585; Taylor on Evidence, sec. 1135; Leake on Contracts, 5th ed., pp. 125-6, and cases cited.

Then, had the jury found that there was no such agreement, that would settle the question as regards the timber. But, as regards the track trestle and ore bins, they should then have been further asked whether the acts complained of in relation to these things materially prejudiced the plaintiff in the performance of his contract, it being at the same time explained to them, if they found there was no collateral agreement, that the plaintiff had no legal right to the maintenance of the status quo in respect to these appliances, and that he could not complain if other facilities equally advantageous were provided. As I think for these reasons that there ought to be a new trial, it would not be advisable to comment on any of the evidence.

The appellant should have the costs of the appeal, and the costs of the former trial should abide the result.

MORRISON, J., concurred.

MARTIN, J.:—First, so far as the finding of damages is concerned, no good cause has been shewn for interfering with the view the jury took of them, subject to the legal objection that follows.

Second, as regards the trial Judge's ruling on the point of law on the implied covenants in the lease relating (a) to the timber, (b) to the tramway, and (c) to the ore-bins, as complained of in grounds 3, 4, and 5 of the notice of appeal.

As to (c), having regard to clauses 3 and 9 of the lease, I think the learned Judge was right, for they distinctly contemplate the use of the ore-bins—the words "sort out and prepare for shipment" in clause 3, and "remove to Whitewater station the ore prepared for shipment," etc., in clause

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9, point to such user. The case of Jones v. Hanley, 1 N. B. Eq. 250, at p. 256, and the authorities cited later, generally support my view on this head, and on the next one. As regards (b), the matter is not so clear, and I have some doubt about it, but not enough to disturb the view of the trial Judge, particularly when the amount involved is so small, only $25. Having regard to the circumstances, I think it may fairly be said that the use of the tramway for the purpose of the lessee getting timber into the mine under his lease must necessarily be appurtenant thereto.

Then as to (a), the use of the timber. That raises a much wider and more difficult question. The lessor here is himself the lessee of all this extensively developed property which we understand is a Crown-granted one, and therefore the owners have the "use of all the timber thereon, for the purpose of winning and getting from and out of such claim the minerals contained therein:" Mineral Act, sec. 26; and there is no evidence that the claim was located on land occupied under a timber lease, in which case the timber is reserved: sec. 45. It is not in evidence that the lessor is himself entitled to the timber, but his counsel stated that it was assumed he was, and no objection was taken to the statement. Mr. Macdonald cited in support of his main contention against implication the following cases: Earl of Cardigan v. Armitage, 2 B. & C. 197, 324-7, 26 Rev. R. 313; Churchward v. The Queen, L. R. 1 Q. B. 173, 194-5; Midland R. W. Co. v. London and North Western R. W. Co., 15 L. T. N. S. 264; Archibald v. The Queen, 2 Ex. C. R. 374; and Hill v. Ingersoll Road Co., 30 O. R. 191, 201.

The respondent's counsel conceded that if the case were being tried in England he could not succeed, but asks for a different judgment here on two grounds: (1) that by our said Act the timber is now a statutory appurtenance to a mine; and (2) that the plaintiff had already given two leases of substantially the same area to the defendant, and that in working them he had been allowed to use the timber without hindrance, and therefore the same course should be presumed here, and he should not have been prevented, as he undoubtedly was, from that user under this third lease. But this is not the exact position, because on p. 27 the plaintiff admits that the last lease he had was not from the plaintiff personally, but from the Whitewater Mines Limited, though the

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plaintiff was manager thereof at the time. I note that, although the plaintiff's counsel cross-examined on one of these leases, full, or even necessary, particulars are not before us of either of them, and the evidence being so indefinite of this point (2), I cannot safely found my judgment on it.

Then as to (1). Said sec. 26 in its latter part also extends the said timber rights conferred upon Crown grantees to "the lawful holder by record of a claim . . . during the continuance of his record," but I fail to see that because the grantee or lawful holder has certain statutory rights they necessarily enure to the benefit of his lessee, and also further descend to his sub-lessee. No such custom in this province was sought to be proved, and it certainly is not necessary for the working of the mines such as the one in question that it should be so. Where, as here, portions of the mine are leased to different persons all carrying on their operations simultaneously, including a portion being worked by the lessor, it would not be even in the reasonable contemplation of all concerned that they all should have an unfettered right to cut timber at discretion. I say this with every respect to the contrary opinion of the trial Judge, whose large experience in a mining country gives weight to his view. And at the same time I acknowledge I can imagine circumstances where it would be a necessary implication that timber on the claim should be cut by a lessee. The question is an interesting one on which I cannot say I have as strong an opinion as I should like, and the said unusual features of this lease render it more difficult to say what should be implied than in the case of a lease of an entire mine to one person, cases on which are to be found in the books, but they throw no light on the exact point here, though I have vainly consulted many authorities for that purpose, including those of the mining States of America.

The matter is still further complicated by the fact that many necessary things, even the use of the tunnel, are manifestly left to implication in the meagre and one-sided lease now before us, which contains many covenants by the lessee but none by the lessor, so the rule of restricting the parties to their express agreement cannot be wholly enforced: Aye v. Philadelphia Co., 20 Morr. Mining R. 177. A covenant for quiet enjoyment, for example, must be implied, as well as for the right of entry: Knotts v. McGregor, ib. 432; and compare

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one not to mine coal so as to injure the surface: Mickle v. Douglas, 17 Morr. Mining R. 137. There is also much to be said, especially in the formative conditions of a new country, in favour of the opinion of the Court in McNish v. Stone, ib. 22, that a lease (there to bore for an oil well) "must be construed with reference to the known character of the oil business, and the evident intention of the parties."

But the result in the present circumstances must, in my opinion, for the reasons first mentioned, be that the damages awarded, $125, on this head, for timber, cannot stand, and the appeal should be allowed to the extent of reducing the verdict by that amount.

ADDENDA.

Iveson v. City of Winnipeg, ante p. 118, insert names of counsel as follows:

Isaac Campbell, K.C., and T. A. Hunt, for appellants.
H. A. Robson and H. P. Blackwood, for respondent.

In Carruthers v. Fischer, ante p. 42, counsel for defendant should be H. A. Robson and J. Graham.

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BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

BLUE v. RED MOUNTAIN R. W. CO.

Railway—Negligence—Fire—Destruction of Property in Neighbourhood—Right of Way—Findings of Jury—View—Misdirection—Non-direction—Damages.

Appeal by defendants from judgment of MORRISON, J., in favour of plaintiffs, upon the verdict of a jury in an action to recover the value of timber, cordwood, tram roads, bridges, etc., destroyed by fire alleged to have been started on or near the defendants' right of way from a locomotive belonging to defendants.

The appeal was heard by HUNTER, C.J., IRVING, J., MARTIN, J.

A. H. MacNeill, for defendants.

Hamilton, K.C., for plaintiffs.

HUNTER, C.J.:—A number of questions were submitted to the jury after hearing counsel, of which they answered only the following 4, viz.:

"5. Is the rocky bluff mentioned in the evidence within the right of way of the defendants? A. Yes.

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6. If you find that the fire which was burning on the upper side of the track on August 23rd and 24th was set by locomotive No. 9, at what point did such fire commence? A. On the rocky bluff.

7. Was the fire on the St. Louis mineral claim set by sparks from the fire which originated near the railway? A. Yes.

8. Were the defendant company guilty of any negligence? If so, in what did such negligence consist? A. Yes. In leaving inflammable material on the right of way."

But they also found a general verdict for the plaintiffs for $18,000.

The counsel for the appellants strenuously contended that the jury could not reasonably find that the fire which caused the damage originated from the fire which indisputably started on or near the right of way, but we were all of opinion at the hearing that the verdict could not be set aside on that ground, and it only remains to consider the other objections.

The first one was that the jury were wrong in finding that the rocky bluff on which the fire was started was within the right of way, and it was contended that, as the company had never filed any plans of their right of way either at Victoria or Ottawa, the right of way must be considered to be only the road bed itself. This, of course, would mean that the road bed would be of varying width, that it would be wider where there was an embankment than where it was on level ground, which would seem unreasonable, as it would not provide the necessary room or facilities to maintain the road bed or to make changes or repairs. Suppose, for instance, that it was found necessary to put a culvert under an embankment, would not the company be the first to object if they were told to confine their operations within the "toe of the slope?" Again, it is obvious that it is expedient, especially in the case of mountain roads, to take the full statutory allowance, as it is often found necessary or advantageous to shift the road bed a few feet either way for the purpose of altering grades or curves, as well as to make provision for establishing turn-outs and switches as the traffic develops. Moreover, speaking generally, it is plain that the due protection and maintenance of the track would be practically impossible if the right of way were confined to the road bed itself, and it must also be plain that the obligation to fence

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would be made unnecessarily awkward unless a uniform width were taken. But there was some evidence that the company never considered that their right of way was limited to the road bed itself, as Morgan, the superintendent of both the Canadian and American portions of the system, admits that the American end of the right of way is 200 feet wide, where it turns through government land, and 100 where it has been purchased; and Renwick, P. L. S., says he surveyed the right of way in question, and that he marked out 100 feet on each side of the centre line, but he did not get his instructions from the defendant company. Suppose, however, we disregarded all this, then the company, who alone had knowledge of the matter, left the jury in the dark and put them in the dilemma of choosing between the proposition that the right of way was confined to the road bed, and the more reasonable one, having regard to the circumstances, that they had taken, or at all events had occupied, the full statutory allowance.

Then as to the jury's finding that the place where the fire started was within the right of way. There does not seem to have been the care taken in measuring the distance that there ought to have been, but one witness, Rolf, swears that he took the measurement of the place which Curry pointed out, and found it to be 53 feet 8 inches, following the slope of the ground from the track, by which it appears he meant the nearest rail, and gave it as his judgment that it was about 48 feet on the level. He also took a line through 3 points on the edge of what appeared to be the cleared right of way, the 2 points furthest from each other being 456 feet apart, and the 3 points being respectively 52, 45, and 53 feet distant from the centre of the track, and found the place in question to fall between a line joining these 3 points and the track; and while, no doubt, more satisfactory measurements could have been made, still I cannot say that this evidence, coupled with the view, was not sufficient to enable the jury to find as they did.

It was also argued that there was misdirection, and, while certain passages of the charge might be open to objection if taken by themselves, it is familiar law that the Judge's charge is not to be minutely criticized, and that too much stress is not to be laid on isolated passages if the charge as a whole puts the case fairly before the jury. For instance, the learned Judge said:—

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"You viewed that locality; it is for you to say whether (even disregarding all the evidence you heard) whether that fire had come over from the fire which had worked up from the Red Mountain railway, whether it could possibly or probably have leaped over and (did) come to the ground very near the St. Louis buildings. Whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track. It is for you to say whether you can determine that for yourselves, regardless of what was said for or against. If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard."

But the very next sentences prevented the jury from getting a wrong notion of what he meant:—

"Do you believe that the evidence which you heard on behalf of the plaintiffs, with respect to that fire having jumped, is conclusive? Do you, on the other hand, believe the evidence of the defendants that it was a physical impossibility that that space could have been jumped, under the conditions of this draw, and the high wind—a voluminous fire with a lot of material carried in the air. Applying your own common sense and experience and knowledge of fires, and what you have heard, and the conditions prevailing during a large conflagration, are you prepared to say that it was impossible that this Jumbo fire should have extended over and done the damage to the plaintiffs' timber?" etc.

Then it was urged that the learned Judge virtually assumed throughout his remarks that the rocky bluff was within the right of way, but I think it is evident that he used the term "right of way" as a convenient expression to describe the strip of land over which the company had been either exercising acts of ownership or availing themselves of their statutory powers in respect of clearing the timber, and it must be remembered that he was left in the dark just as much as the jury as to what was the real right of way. At any rate, in question 5 he left it explicitly to the jury to find as a fact whether or not the rocky bluff was within the right of way.

As to the objection that there was non-direction, it is well settled that this is not a ground for a new trial unless it causes a verdict against the weight of evidence: see Ford v. Lacey, 30 L. J. Ex. 351; Great Western R. W. Co. v. Braid.

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1 Moo. P. C. N. S. 101; Alaska Packers' Association v. Spencer, 35 S. C. R. 362; and the only non-direction specifically complained of is that the Judge should have charged that there was no evidence on which the jury could find that the rocky bluff was within the right of way, but, as we have just seen, he would not have been justified in charging to that effect.

It was also urged that under sec. 239 of the Railway Act the damages could not exceed $5,000, but the finding that the defendants left inflammable material on the right of way disposes of this objection, as that is the limit where there is no negligence.

With certain exceptions, statutory and other, not necessary to notice here, the common law rule is that fire must be kept in by him who uses it, and the railway company are freed from liability for damage arising from its escape only so far as the legislature has said so: see Jones v. Festiniog R. W. Co., L. R. 3 Q. B. 733; Power v. Fall, 5 Q. B. D. 597; and liability for negligence is distinctly preserved by the section.

It was also argued that the section inferentially confines all liability for damage, whether it arises through negligence or not, to those cases where it occurs upon or along the route of the railway, and that, as the plaintiffs' property did not lie upon or along the route of the railway, but was 3 miles off, there was no liability, but I am clear that the section does not put any limit either as to amount or place when the action is founded on negligence. But supposing it did, and that no negligence was proved, and it was necessary to decide the question as to whether the plaintiffs' property lay along the route of the railway, I should say that it did. The word "along" does not mean only adjoining to or contiguous to, as does the word "alongside," but in the neighbourhood of, or near or close to, and I think that property within the range of mischief caused by the operation of the railway, was intended to come within the scope of this word; and I think that this view also gathers force from the fact that the expression used is not simply "along" but "upon or along."

It was also objected that the verdict was excessive, and the evidence of Hilligoss, a cruiser for the Great Northern Railway Company, was referred to, but he admits that the plaintiffs were in a much better position than himself to

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estimate the quantity destroyed, and I am unable to find any ground for saying that the amount assessed is unreasonable.

I think the appeal must be dismissed.

IRVING, J., concurred.

MARTIN, J.:—At the outset it is urged that there was no evidence to support the 5th finding of the jury, that the fire originated on the right of way. I think there was, but, in view of my opinion that there should be a new trial for misdirection, I refrain, for obvious reasons, from here canvassing the evidence.

Misdirection is contended for on two heads, but the only one which it is necessary to consider is that regarding the extension of the fire from the right of way to the plaintiffs' property. The passage complained of is as follows:—

"You viewed that locality; it is for you to say whether (even) disregarding all the evidence you heard—whether that fire had come over from the fire which had worked up from the Red Mountain railway, whether it could possibly or probably have leaped over and did come to the ground very near the St. Louis buildings—whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track. It is for you to say whether you can determine that for yourselves, regardless of what was said for or against. If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard, that it was the same fire that started from the railway that destroyed Blue & Deschamps's timber? Do you believe that the evidence which you heard on behalf of the plaintiffs with respect to that fire having jumped is conclusive? Do you, on the other hand, believe the evidence of the defendants that it was a physical impossibility that that space could have been jumped, under the conditions of this draw, and the high wind; a voluminous fire with a lot of material carried in the air; applying your own common sense and experience and knowledge of fires, and what you have heard, and the conditions prevailing during a large conflagration, are you prepared to say that it was impossible that this Jumbo fire should have extended over and done the damage to the plaintiffs' timber? Does it appear to you impossible?"

It is urged that the fair construction of that language

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is that the jury could only understand that their duty was first to decide the question on the result of their own view, apart from any inspection, and in case they could not decide from their own inspection, then only were they entitled "to call to (their) assistance the oral testimony, the evidence of those whom (they) had heard;" and that they must have received that definite impression despite the subsequent reference to "what you saw and . . . heard," which could only relate to their secondary state, i.e., failure to decide on the view merely.

This whole subject of the requirements of a charge was recently fully considered in the case of Alaska Packers' Association v. Spencer, 35 S. C. R. 362, affirming a decision of this Court, 10 B. C. R. 473, wherein it was held that the non-direction in that case was so defective as to amount to misdirection. In view of the said full consideration by both Courts, it would be superfluous, if not worse, for me to go over the ground again, and I shall content myself with saying that after applying the rules there laid down to this case, and giving every possible effect to the principle that "the whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions," (cited at p. 372 from Clarke v. Molyneux, 3 Q. B. D. 237), I can only, with some reluctance, reach the same conclusion that was reached in that case, viz., that on a material point the "question left by the Judge to the jury was put in an inaccurate shape." The expressions here were far from being detached or isolated, but given directly on a main point on which the chief conflict of evidence occurred. As a matter of precaution, I note that the reference in the appeal book on p. 385, line 9, to "part of the proof" being the view, is directed to another question, the width of the right of way. Such being the case, the situation is governed by the remarks of Lord Blackburn, cited at p. 374 by Mr. Justice Killam, in Prudential Assurance Co. v. Edmonds, 2 App. Cas. 487: "When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the Judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a venire de novo."

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It is admitted that the defendants' counsel did not at the trial take any exception on this point to the charge, though he did on others. In such case, he could not have a new trial were it not for the new proviso in sec. 66 of the Supreme Court Act. That section was, as a matter of precaution, alternatively considered by me in Alaska Packers' Association v. Spencer, 10 B. C. R. at p. 490, though I was of the opinion, which was affirmed on appeal, that even under the old practice the charge could not stand. And it was also later considered, and its application restricted in certain circumstances, i.e., by agreement, or course of conduct at the trial, by this Court in Scott v. Fernie Lumber Co., 11 B. C. R. 97.

There is no doubt in my mind that the proviso applies to such a case as the present, and it comes to a question of costs of the abortive trial, for those of this appeal in such conditions are directed to be paid by the appellant. In the exercise of our discretion as to said costs, I think we should direct that they should be paid forthwith to the respondent after taxation.

So far as regards the view that was had herein, I do not wish to be understood as holding that the jury would not have been entitled in the circumstances to rely to a considerable extent thereon: they would have been, but not primarily and to the exclusion of other evidence. In this relation refer to Jenkins v. Budding, [1891] 1 Ch. 484, wherein as Lord Justice Kay says, the Court of Appeal considered a view to be "material" if not "essential," and I repeat what I recently said in this Court in Star Mining and Milling Co. v. Byron N. White Co. on 15th November last, not yet reported, and in Marshall v. Cates, 10 B. C. R. 153. The case of London General Omnibus Co. v. Lavell, 17 Times L. R. 61, which was cited to the contrary, is very restricted in its application, for the trial Judge there acted on a view merely, without any evidence on the point at issue, i.e., the misleading of the public by omnibuses resembling the plaintiffs'. See note thereon in Taylor on Evidence (1906), vol. 2, p. 396; and indeed the whole chapter on "Evidence addressed to the senses" is instructive on the point.

The result is that the appeal should be allowed, the judgment set aside, and a new trial ordered, but the appellants must pay the costs above and below as hereinbefore mentioned.

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NORTH-WEST PROVINCES.

(MACLEOD.)

STUART, J. JANUARY 23RD, 1907.

TRIAL.

SAWYER AND MASSEY CO. v. THIBART.

Sale of Goods—Machinery—Promissory Notes given for Price—Action on—Contract—Construction—Acceptance of Goods—Failure to Return Pursuant to Provision of Contract—Counterclaim—Breach of Implied Warranty—Sales of Goods Ordinance—Express Warranty in Contract—Machinery Bought for Particular Purpose Known to Vendors—Reliance of Purchaser on Vendors' Skill and Judgment—Sale of Specified Article under its Trade Name—Damages—Costs.

Action to recover the amount of promissory notes given by defendant for the price of machinery sold to him by plaintiffs, and for other relief. Counterclaim for damages for breach of warranty.

R. B. Bennett, for plaintiffs.

E. P. McNeill, for defendant.

STUART, J.:—Some time in the spring of 1905 defendant, who is a farmer living near Cowley, Alberta, entered into negotiations with one Hartrouft, a general agent for the Massey-Harris Co., who in turn were agents for the plaintiffs, for the purchase of a threshing outfit. One Morrison, a blacksmith at Cowley, who was local agent for the Massey-Harris Company, was present, and took part in the negotiations. The defendant decided to buy from the plaintiffs a New Ontario T. P. Thresher, with 26-inch cylinder, a three horse tread power, and some additional attachments, all for the sum of $615. An agreement was drawn up on what was apparently one of the regular forms used by plaintiffs, but was never signed. This agreement was in the same general form as the later agreement upon which this action is brought, and to which I shall presently refer. Some time afterwards

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the defendant decided to buy a different kind of thresher, namely, an Eclipse, with a 30-inch cylinder, instead of the New Ontario previously agreed upon. Hartrouft took this last amended order verbally, and finally, somewhere about 20th August, the Eclipse thresher, a three-horse tread power, and a bagger and some rubber belting, were shipped to Cowley by plaintiffs, consigned to Morrison, and were there put together by an agent of the plaintiffs named Brandon. Plaintiffs paid the freight on this machinery to Cowley. About a week afterwards the defendant was given possession of the machinery, without as yet having signed any agreement of purchase. Apparently with the knowledge and consent of Morrison, he took the machinery to the farm of a neighbouring farmer named Carney and proceeded to thresh his grain. The machine did not work satisfactorily, a great deal of difficulty being experienced in preventing it from choking up. Morrison came out to Carney's several times and finally got a man named LaBonté, who was not an employee of the plaintiffs, but was considered as an expert in threshing machinery, to endeavour to fix the machinery up so that it would work more satisfactorily. Hartrouft also came for the purpose of getting a "settlement" from the defendant. After these men had made some alterations in the machinery and had got it to work considerably better, the defendant, at Hartrouft's request, then signed an agreement between himself and the plaintiffs, the material portions of which are as follows: "Agreement made the 1st day of September A.D. nineteen hundred and five between Sawyer and Massey Company, Limited, hereinafter called the company, and Moses N. Thibart, P.O. address, Cowley, hereinafter called the purchasers. The company agree to sell to the purchasers, who agree to buy from the company, an Eclipse thresher with 30-inch cylinder, 36-inch body, with pulley. A three-horse tread power, Pitts pattern with trucks. The fixtures and extras for each as stated in price list; also Eclipse Bagger and 60 feet 5-inch 4-ply rubber belt, marked Sawyer & Massey Co., Limited, Hamilton, Ontario, subject to the terms and conditions hereinafter mentioned, at and for the price or sum of $681, payable at the times and with interest as hereinafter mentioned, freight payable 30 days from delivery of goods and purchasers' promissory notes, as follows, $236 due 1st day of December, 1905, $225 due 1st day of December, 1906, $220 due 1st day of December, 1907, bearing interest at the rate of 7 per cent. per annum until due date, and 10

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per cent. per annum after due till paid, said notes to be signed and sent to the company, Winnipeg, on delivery of machinery to purchasers, and no provision contained in said notes shall in any way interfere with or supersede this agreement. All interest in arrear to become principal and to bear interest at the said last-mentioned rate.

"And it is hereby agreed that unless the said cash payment is made and said notes executed and delivered (and satisfactory additional security given if required) before the machinery is used, and within 10 days after the delivery of said machinery, then and in such case the whole contract price shall become due and payable forthwith, and the purchasers hereby covenant to pay the same. The purchasers hereby acknowledge delivery by the company of said machinery f.o.b. cars at Winnipeg, Man., such delivery by the company on cars at Winnipeg to be complete delivery to and acceptance by the purchasers. The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: it is warranted to be made of good material, and durable with good care, and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty, written notice shall within 10 days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance, together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if then the machinery, or any of them, cannot be made to satisfy the warranty, it is to be returned by the purchasers, free of charge, to the place where received, and another substituted therefor that shall satisfy the warranty, or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if both such notices are not given within such time, that shall be conclusive evidence that said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall, at purchasers' request, render assistance of any kind in operating said machinery, or any part thereof, or in remedying any defects, such assistance shall

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in no case be deemed a waiver of any term or provision of this agreement, or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When, at the request of the purchasers, a man is sent to operate the above machinery, which is found to have been carelessly or improperly handled, said company putting same in working order again, the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery.

"There are no other warranties or guarantees, promises or agreements, than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered, or if the printed language of the above warranty is changed, whether by addition, erasure, or waiver, or if the purchasers shall in any respect have failed to comply herewith.

"It is hereby agreed between the parties hereto, that the property in the said machinery shall remain in the company until full payment of the price and any obligations given therefor, but the purchasers shall have possession and the right to use same at their own risk as to damage, or destruction by fire, or any other cause, until any default in payment, as aforesaid, when the whole price then remaining unpaid, or obligations therefor, shall, notwithstanding deferred times of payment mentioned in such obligations, become due and payable as cash forthwith, and said purchasers hereby covenant with the company to pay the same . . . And for the purpose of securing payment of the price of the said machinery and interest, as herein provided, and the costs of drawing and registering the mortgage, each of the purchasers agrees to deliver to the company at the time of their receiving the said machinery, a mortgage on the lands described on the back of this agreement as being owned by him, in the statutory form, containing a proviso that on default of payment for one month, they may, upon one week's notice, sell the said lands."

The defendant also signed the three promissory notes provided for in this agreement, and an additional note for $83.12, dated 11th August, 1905, payable on 1st October, 1905, and bearing interest at 7 per cent. per annum till due, and 10 per cent. per annum after due till paid, this note

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being for the amount of the freight paid by plaintiffs on the machinery from Winnipeg. Hartrouft then left, and defendant continued to work the machinery, first at Carney's, then at his own place, and thereafter at a number of neighbours' farms, until late in the month of November, when operations were apparently stopped by a snow storm, and the threshing season closed. Defendant states that during all this time he kept complaining to Morrison, whenever he saw him, that the machinery still did not work satisfactorily. He states also that shortly after LaBonté was at Carney's he wrote to plaintiffs, and Morrison states that he himself, owing to defendant's complaints, wrote to the plaintiffs. On 23rd September one Moore, an agent of plaintiffs, who was not called as a witness, went to defendant's place, where the machine was working, and examined it, took notes of defendant's complaint, said that he thought it was working all right, and, having done nothing to it whatever, went away. According to defendant's statement of the time he spent at each place, he spent altogether about 7 weeks and 5 days, at actual threshing, exclusive of a period of about 3 weeks at the beginning of October, during which he did nothing, and exclusive also of the time spent in moving. Towards the end of November defendant took the machine home, and it is still in his possession. He made default in payment of the note of $83.12, which fell due on 1st October, 1905, and also in payment of the note for $236 and interest which fell due on 1st December, 1905.

On 2nd January, 1906, plaintiffs began this action, wherein they claimed judgment not only for the amount of the two notes, already overdue and unpaid, but also, in pursuance of the terms of the acceleration clause in the agreement, for the amount of the two remaining notes for $225 and $220 respectively, together with interest thereon as agreed. They also ask to have it declared that they are mortgagees or pledgees of section 9, township 9, range 1 west of the 5th meridian. This latter claim, however, was not pressed at the trial, and, as the defendant swore that he was not the owner of the lands in question, I am of opinion that this part of the plaintiffs' claim cannot be granted. With regard, however, to the claim for judgment for the amount of the notes, I do not see how the defendant can expect to escape, aside from the question of his counterclaim, with which I shall deal later on. It is true that he says he wrote to the company com-

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plaining, but the letter was not produced, nor was there any definite evidence of its contents. It is true, also, that he complained to Morrison verbally, and that Morrison wrote to the company. No doubt, Moore's visit was due to these complaints, but after Moore's visit defendant still continued to work the machine, took it round to a large number of neighbours' farms, even started in again after a rest of three weeks, and threshed for a month or more. His position might have been different if he had immediately after Moore's visit ceased to use the machine at all. I think he was bound to take Moore's statement on that occasion—that in his opinion the machinery was working all right—as an indication that plaintiffs did not intend to make any further attempt to remedy any defects. He not only did not return the machinery as agreed upon, but he continued to work it for a considerable time, and, even if he had ceased to work it, I do not think he gave any satisfactory excuse for not performing his part of the agreement by returning the machinery to plaintiffs. Morrison was living at Cowley, and could have taken charge of it. Defendant's excuse that he kept the machinery in his possession because he thought plaintiffs might hold him responsible for anything that might happen to it, does not appear to me, therefore, to be a valid one, but, even if it had been, he should not have continued to work it for a month longer. I feel bound, therefore, to hold that, even if the express warranty set forth in the agreement was broken, which, for reasons I shall give hereafter, I very much doubt, he deprived himself of all benefit under it, as a defence to an action for payment of the price, by not complying with the terms and conditions under which it was given. The plaintiffs are therefore entitled to judgment for the amount of their claim.

A much more difficult question, however, arises when we come to deal with the rights of the parties under the defendant's counterclaim. Paragraphs 3, 4, and 5 of the statement of defence, which are incorporated by reference in paragraph 10 of the counterclaim, are as follows:—

"(3) The defendant says that he purchased said machinery for the purpose of threshing his own grain and taking contracts for threshing in his neighbourhood, and the plaintiffs knew said purpose and sold said machinery to him for such express purpose, but the machinery failed to answer same. (4) The defendant pleads the Sales of Goods Ordinance as a

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defence to this action. (5) The plaintiffs warranted the machinery to perform the work for which the defendant purchased same aforesaid, but the machinery did not come up to the requirements of said warranty."

No attempt was made by the defendant, either in his pleadings or at the trial, to take advantage of the express warranty contained in the contract, which I have already quoted, no doubt because he realized that, in view of his continued working and retention of the machinery, he had forfeited all benefit to be derived from it. By the above pleadings, however, and by his evidence and argument at the trial, the defendant raised the question of the existence of an implied condition under the terms of sec. 16, sub-sec. 1, of the Sales of Goods Ordinance, which is as follows: "Subject to the provisions of this Ordinance and of any Ordinance in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows: 1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent, or other trade name, there is no implied condition as to its fitness for any particular purpose."

It was with the right of the defendant to rely upon this section of the Ordinance that the contest at the trial was chiefly concerned. Mr. McNeill, for the defendant, argued that the existence of the express warranty did not displace the implied condition of reasonable fitness for a particular purpose; that the machinery was bought — as the plaintiffs knew—for the particular purpose of threshing by contract; that it was not fit for that purpose; that the facts shewed that defendant had relied on plaintiffs' skill and judgment in making his purchase; that the condition had not been fulfilled; and that therefore defendant, if not entitled under the circumstances to reject the goods entirely, was at any rate entitled to damages for breach of this condition. Mr. Bennett, for the plaintiffs, contended that the

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facts shewed: 1st, that defendant had decided to purchase a threshing outfit limited to three-horse power; 2nd, that he had decided to purchase a 30-inch cylinder thresher; 3rd, that in pursuance of this decision of his own, he was furnished with what he asked for; 4th, that he signed the agreement and made "settlement" after having tried the machinery, and could not now take objection to it; 5th, that with regard to the implied condition of fitness for a particular purpose, there was only one purpose for which the machinery could possibly be used, and, therefore, there could in this case be no particular purpose; 6th, that defendant did not, in fact, rely on plaintiffs' skill and judgment, but relied entirely upon his own.

Before referring to the arguments thus advanced, I think it advisable to deal with one or two other considerations which were not advanced, or at any rate not pressed, on the argument, but which have given me some difficulty. Sub-section 4 of sec. 16 of the Sales of Goods Ordinance provides that "an express warranty or condition does not negative a warranty or condition implied by this Ordinance unless inconsistent therewith." The express warranty in this case is in these words: "It is warranted to be made of good material and durable with good care and proper usage and skilful management to do as good work as any of the same size sold in Canada." Is this express warranty inconsistent with an implied condition that the machinery should be reasonably fit for the particular purpose of doing threshing under a contract for hire? Upon consideration, I cannot see that it is. If that contract had contained the following sentence: "It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada, and it is warranted to be reasonably fit for the particular purpose of doing threshing under contract for hire"—it could not be contended that the two clauses of that sentence would have been inconsistent with each other. I can see no inconsistency. If the two warranties were identical with each other, then, of course, as pointed out by Wetmore, J., in Cockshutt Plow Co. v. Mills, 2 W. L. R. 358, the defendant could not be allowed to get rid of the provisions of the express warranty in the contract by pleading the same warranty as an implied one. But I am of opinion that the two are not

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identical. The express warranty in Cockshutt Plow Co. v. Mills was simply that the machine would "do good work," but here it is that the machinery will "do as good work as any of the same size sold in Canada." It is perfectly clear to me that the machinery might very well do as good work as any of the same size sold in Canada, and yet not be reasonably fit for the purpose of threshing on contract for hire; in fact, as I shall point out later on, I am of opinion that the machinery probably did as good work as any of the same size sold in Canada. The whole trouble arose, however, as I shall also point out, from the relative sizes of the two chief parts of the machinery, so that it is clear to me that the warranties are not identical. Neither do I think that, in the face of the express provision of the Ordinance already quoted, the doctrine of "expressum facit cessare tacitum," and the older cases based upon that maxim, which are cited in the last edition of Benjamin on Sales, at p. 653, can be relied on to exclude the implied warranty. The implied warranty must stand, unless inconsistent with an express one, and, as I have said, I do not think there is here any inconsistency. I am confirmed in this opinion by the remarks of Dubuc, C.J., in the Manitoba case of North-West Thresher Co. v. Darrell, 2 W. L. R. 264, from which it is clear that that learned Judge considered that there was no inconsistency in an exactly similar case, although he held on the facts that the implied warranty had been fulfilled.

Another point which was not mentioned in the argument, but which has given me some difficulty, arises from a consideration of the proviso at the end of sub-sec. 1 of sec. 16 of the Ordinance, which reads: "Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose." I have no doubt that "an Eclipse Thresher" is a trade name, as also is "an Eclipse Bagger." Further, although there is no evidence given on the point, there can, I think, be little doubt that the expression "three horse tread power, Pitts pattern," is also a trade name. These three articles constituted, with the belting, the goods sold. As there was no question raised as to the quality of the belting, it seemed to me at first rather difficult to contend that this contract did not come within the terms of this proviso. But it will be

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observed that the contract is not divisible. It is one contract for the sale, not of a specified article, but of a combination of specified articles. There is one price specified for the whole outfit combined. That combination has neither a patent nor a trade name, and, as will be pointed out presently in further consideration of the evidence, the whole trouble arose just exactly out of the combining of these articles into one single piece of machinery, and out of the attempt to work them together, and not out of any defects in any one of them separately. I am therefore of opinion that the proviso does not apply to the contract in question.

Then there is still a further question arising out of a provision in the contract itself, which, again, was not mentioned in the argument. The contract, after setting forth the express warranty and the conditions attached to it, proceeds as follows: "There are no other warranties or guaranties, promises or agreements, than those contained herein." Do these words exclude an implied condition? In the first place, I doubt if it is open to plaintiffs to take advantage of that, because, although defendant quite definitely in his counterclaim set up implied warranty, plaintiffs in their defence to the counterclaim make no reference to this provision of the contract, and I think it is clear that paragraph 2 of the plaintiffs' reply to the defendant's defence to the action is intended only as a denial of the existence of any other express agreement or warranty which an agent might have made verbally or otherwise. However this may be, I am of opinion that the words quoted do not exclude an implied condition of fitness. I think these words were intended only to exclude other express agreements, such as an unauthorized agent might attempt to make. Section 53 of the Sales of Goods Ordinance enacts that "where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract." Is an implied warranty of fitness varied or negatived by an express agreement in this case? I think not. By "an express agreement" I think the section means an agreement which expressly mentions the implied warranty which it is intended to vary or negative. Now, the implied warranty of fitness is not mentioned or referred to in the contract at all, and in order

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to be relieved of it, if it would otherwise arise, I think the plaintiffs should either have inserted in the contract an express warranty inconsistent with it, or should have expressly stipulated that they did not warrant the articles sold to be fit for any particular purpose. They have done neither. I therefore come to the conclusion that it is still open to defendant to take advantage of an implied warranty of fitness, provided the facts are such as to bring the case within the terms of sec. 16, sub-sec. 1, of the Ordinance.

We come, therefore, to the questions of fact. First, was the machinery required for a particular purpose expressly or by implication made known to the plaintiffs? And, second, did defendant rely on plaintiffs' skill and judgment? I am of opinion that both of these questions must be answered in the affirmative. It was contended that there could be only one purpose for which the machinery was suitable, and that therefore there could be no particular purpose within the meaning of the Ordinance. But the machinery might have been used either for threshing defendant's own grain on his own farm, for which purpose I think it was suitable, or for use in performing contracts of threshing for hire. This latter, I think, is a particular purpose within the meaning of the section, and I hold, upon the evidence, that it must have been and was known to plaintiffs when the order was given. Quite aside from the conversations between defendant and Hartrouft, the plaintiffs' agent, the contract itself in one paragraph contains a provision whereby all moneys earned by the purchasers for work done with the aid of the machinery are assigned to the plaintiffs. See also remarks of Collins, M.R., in Preist v. Last, [1903] 2 K. B. at pp. 153 and 154.

It was further contended most earnestly for plaintiffs that defendant relied solely upon his own judgment and not upon that of the plaintiffs. In fact, it was evident from the cross-examination and the argument that it was upon this point that plaintiffs chiefly relied. We have only the evidence of defendant and of Hartrouft. Defendant states that he first decided to have a three-horse tread power and a New Ontario thresher in combination with it. This thresher had a 26-inch cylinder. The first agreement was, in fact, drawn up in that way. "Later on," he says, "I saw Mr. Hartrouft, and he said there was another machine called the 'Eclipse,' that I could thresh more with—could

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run it with a three-horse tread power." He states also that he then got a catalogue, but no catalogue was produced at the trial, and nothing, of course, can be said as to that. In cross-examination, however, he told plaintiffs' counsel, "I understood that the 'Eclipse' would thresh more;" "I made inquiries, I asked Mr. Hartrouft about it;" "I told him that I wanted a machine that I could thresh as much as possible with a three-horse tread power;" "I told him I wanted the 'Eclipse,' provided I could thresh more;" and again, when he was recalled and again cross-examined, the following evidence was given: "Q. And after you went over this matter—made inquiries—looked into it, you saw Hartrouft and you told him that you wanted to have a 30-inch cylinder separator? A. Provided the three-horse power was equal to run it. Q. Did you put in any proviso? A. I did not in writing, but I told him."

Now, Hartrouft, who was called by defendant and cross-examined by plaintiffs, nowhere in his evidence attempted to deny these assertions of defendant. Not the slightest attempt at denial was made. All he stated was that "later on when I saw him he thought the 'Eclipse' separator could be handled with the three-horse power and be more suitable to him than the other." And again he said: "Q. As a matter of fact, you did not pretend to have any special knowledge? A. The first time I met Mr. Thibart I did not know what we had in that line, and I sent down for inquiries as to what we had. Q. And that is the reason this New Ontario was suggested as the proper one? A. Yes, and afterwards he concluded that the three-horse power would handle the 'Eclipse,' and he asked me to change it, and I had it changed."

Now, it is not a question of what defendant thought or concluded or decided. It is a question of what led him to so think or conclude or decide. Of course, defendant decided to buy the "Eclipse," and, no doubt, he thought it would run well in combination with a three-horse power. If he had not so decided, there would have been no sale; just as in Wallis v. Russell the little girl, of course, decided to buy the crabs which she saw before her, and in Preist v. Last the plaintiff decided to buy the hot water bottle which was shewn him, but the real question in these cases was, as it is here, what led to that decision? It is true, also, that Hartrouft swears that he did not induce or

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try to induce Thibart to buy any particular kind of machine. That might be so; but this is not a case of damages for fraud or misrepresentation. It is one thing to actively induce a man to buy an article. It is quite another thing to have your skill and judgment relied upon in the selection of the article. It is, of course, clear that defendant himself decided upon a three-horse power. The question was, what should be combined with it? Hartrouft says he wrote to his principals to find out. That was the reason the New Ontario was first selected. It seems to me clear, even from this, and quite aside from what defendant said to Hartrouft, that plaintiffs must have known that defendant was relying upon them; but, in any case, these vague and general expressions of Hartrouft contain nowhere any specific denial of what defendant asserts in regard to the conversations between them. Defendant gave his evidence in a straightforward manner, and I have no reason whatever to doubt his testimony. I therefore feel bound to find that he in fact did tell Hartrouft what he says he told him, and that Hartrouft did say to defendant what defendant swears he said. Having reached that conclusion, I cannot, it seems to me, avoid the further conclusion that defendant did, in fact, rely upon the skill and judgment of plaintiffs in deciding to order the particular combination of machinery which was eventually sent to him. He says that he told Hartrouft that he wanted the 30-inch cylinder Eclipse, "provided the three-horse power was equal to run it." He says that Hartrouft told him the Eclipse could be run with a three-horse tread power. The absolutely necessary inference from these facts and from the other assertions I have quoted, is, I think, that defendant did rely upon plaintiffs' skill and judgment, and I therefore so hold.

The further question remains: Was the machinery reasonably fit for the purpose for which it was required, namely, threshing grain by contract for hire? There can be no question upon the evidence that it was not. It is true that no defect was shewn in any of the separate parts of the machinery. It was not attempted to be shewn, for instance, that the power of three horses was not, in fact, communicated from the tread power to the thresher, nor was there any defect shewn in the thresher itself. There was some slight hint of small defects at the start, such as rods breaking on the tread power and loose tin in the separator,

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but these seem to have disappeared. It was practically taken for granted at the trial that the real trouble lay in the fact that a three-horse tread power was not sufficient to run a 30-inch cylinder thresher. The evidence of Kemmis, a man of very large experience with such machinery, and who was present during a good deal of the trouble at Carney's, was to the effect that the whole difficulty lay in the lack of power. While, therefore, the machinery probably did as good work as any of its size sold in Canada, according to the words of the express warranty, it is clear that, owing to the wrong combination of a 30-inch cylinder thresher with a three-horse tread power, the whole machine combined did not do reasonably effective work as a machine for threshing grain on contract for hire. The plaintiffs' counsel, in fact, admitted at the close of the argument that it was not an economical piece of machinery, that it could not be worked economically. It is clear, therefore, that it was impossible to make a profit with such machinery at threshing for hire, which was the particular purpose for which it was required.

It was contended, however, by plaintiffs that defendant had seen the machine work before he signed the agreement, and must be held to have accepted it as it stood. I am of opinion, however, that the actual contract of purchase was made long before this, when defendant gave the order. If defendant had refused to sign the agreement, I think plaintiffs would still have considered him liable as having ordered the machinery and taken delivery of it. It was understood, moreover, from the beginning, that this formal agreement was to be signed. A previous one for the New Ontario thresher had, in fact, been drawn up, and had been seen by defendant, and the terms of it were known. I think the position was just the same as if the agreement had been signed when the order was given. Even before signing it, defendant received a further assurance from Hartrouft, not that the machine was then working all right, but that it would be all right, that it would work better when it was "limbered up," as he said. Nothing, therefore, in my opinion, occurred at the time of or before signing the agreement which would deprive defendant of his rights under an implied condition. I have held, however, that defendant has accepted the machinery, and therefore this condition has become a warranty only. The result is, that

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plaintiffs are liable for a breach of this warranty, and defendant is entitled to damages for the same.

When I come to consider the question of the amount of damages suffered by defendant, I find that the evidence is not very clear. I think it is useless to attempt to make any calculation upon the prospective amount of grain which defendant says he might have threshed. Neither do I think defendant is entitled to much consideration for the time lost after Moore made his visit on 23rd September. It was then, however, too late for defendant to have any chance to prevent loss by securing different machinery for that season's work. Defendant's statement that he could reasonably have expected to make sufficient profit during that season to make his first payment upon the machine, seems to me to be not an unreasonable estimate of the damage he has suffered. It is true that he has now on his hands this second-hand machinery, but, as I have said, the separate parts of it appear to be, as far as the evidence shews, in good order, and, aside from the deterioration in value from the use that was made of it, the machinery is worth, no doubt, as much as it ever was. He obtained some benefit from the use of it, at any rate, in the threshing of his own grain. I will, therefore, allow him damages to the amount of the first payment on the price of the machinery, which is $236, and the amount of the freight, namely, $83.12, in all, $319.12.

There will, therefore, be judgment for plaintiffs for the amount of the last two notes and interest thereon, namely, for $445, with interest on $225 from 1st September, 1905, to 4th December, 1906, at 7 per cent. per annum, and with interest on the said sum at 10 per cent. after the latter date until judgment, and also with interest on $220 from 1st September, 1905, at 7 per cent. per annum till judgment. I do not think it is a case for costs.

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NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JANUARY 28TH, 1907.

CHAMBERS.

KERR CO v. SUTER.

Security for Costs—Summons—Affidavit on Information and Belief—Grounds not Shewn — Supplementary Affidavit Filed after Summons Issued—Inadmissibility—Practice.

Motion by defendant for order requiring plaintiffs to give security for the costs of the action.

E. L. Elwood, Moosomin, for defendant.

J. T. Brown, Moosomin, for plaintiffs.

WETMORE, J.:—A summons was taken out on the affidavits of defendant and Mr. E. L. Elwood. The evidence as to residence was contained in the affidavit of defendant and is as follows: "That, to the best of my knowledge, information, and belief, the plaintiffs in this action reside at Winnipeg, in the province of Manitoba, and have no estate or effects within the jurisdiction of this honourable Court." This does not comply with Rule 295 of the Judicature Ordinance, which provides as follows: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." The grounds of defendant's belief are not set out in his affidavit. Evidently for the purpose of curing this, Mr. Elwood prepared another affidavit of himself setting forth that he is the agent of T. C. Gordon, of Carnduff, the defendant's advocate, and "that, from a perusal of what the said T. C. Gordon informs me is, and I believe to be, the copy of the writ of summons served upon the defendant herein, I am informed and believe that the defendant's address is Winnipeg, in the province of Manitoba." A copy of this affidavit, together with a notice that it would be read on the return of the Chambers summons, was served upon the advocate for plaintiffs. At the return of the summons

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plaintiffs' counsel objected to this last mentioned affidavit being read, and contended that if not read the affidavit of defendant was insufficient. I am of opinion that the affidavit of the defendant is insufficient; it does not comply with the Rule which I have cited. As to the other question, whether the affidavit of Mr. Elwood can be read, I have had considerable difficulty in making up my mind. I can find no case which affords me any assistance but one, and that is Ransome v. Eastern Counties R. W. Co., 2 L. T. 237, and in that case it was held that "when a rule to shew cause has been obtained and served, the Court will not allow the party who moved it to come on the day when in the ordinary course cause ought to be shewn and file additional affidavits strengthening the grounds for the rule." I can see no distinction in this respect between a summons and a rule to shew cause. In this case the effort has been by the supplementary affidavit to support a summons which ought not to have been granted in the first instance on the material.

This application will, therefore, have to be dismissed with costs.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JANUARY 29TH, 1907.

CHAMBERS.

GRAY v. BALKWILL.

Dismissal of Action—Summary Order—Frivolous or Vexatious Action—Habeas Corpus to Obtain Custody of Infant—No Reasonable Cause of Action Shewn—Rule 151—Procedure by Petitions or Chamber Summons—Pleading—Waiver—Laches—Amendment—Costs.

Summons by defendant to strike out the statement of claim and set aside the writ of summons.

J. T. Brown, Moosomin, for defendant.

E. L. Elwood, Moosomin, for plaintiff.

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WETMORE, J.:—This action was commenced in the usual form by summons. The statement of claim sets forth that on or about 19th May last defendant kidnapped plaintiff's infant daughter, one Vina Almira Gray, while she was on the highway near the residence of the plaintiff, and still detains her, and that the plaintiff has applied to the defendant to deliver the said child to him, but he has refused to do so unless compelled by order of the Court; and the plaintiff claims: first, an order or direction of the Court that the defendant deliver to him the said infant; second, an injunction restraining the defendant and all other persons under his orders or control, and his servants or agents, from detaining or concealing the said infant from the plaintiff, and from counselling, aiding, and assisting in any such detention or concealment, and from removing the said infant from the jurisdiction of this Court, and from counselling, aiding, and assisting in any such removal; third, a writ of habeas corpus ad subjiciendum to be issued out of the Court directed to the defendant and commanding him to produce before the Court the body of the infant that she may be delivered into the lawful custody of the plaintiff. This, to my mind, is practically an action for the obtaining of a writ of habeas corpus to issue. The relief as to an order that the defendant deliver the infant to the plaintiff and for an injunction are merely incidental.

The defendant appeared by advocate and filed a defence herein, to which the plaintiff has replied. The cause is therefore at issue.

After these proceedings were taken the defendant took out a Chambers summons to strike out the statement of claim and set aside the writ of summons, on the ground that the statement of claim discloses no reasonable cause of action, and that such action is an abuse of the procedure and practice of the Court.

The power to strike out a statement of claim as not shewing a reasonable cause of action is given by Rule 151 of the Judicature Ordinance. It was held in McEwen v. North-West Coal and Navigation Co., 1 Terr. L. R. 203, that the section of the Judicature Ordinance then in force corresponding to Rule 151 was not to be used when the pleading was of such a character that a question of law was fairly arguable under the pleading. In Republic of Peru v. Peruvian Guano Co., 35 Ch. D., Chitty, J., at p. 496,

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in dealing with the corresponding English Rule, lays down the following: "The pleading will not be struck out unless it is demurrable and something worse than demurrable . . . but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation." In Dreyfus v. Peruvian Guano Co., 41 Ch. D. at p. 151, Kay, J., struck out the statement of claim on the ground that the Court had no power to grant the relief claimed. I have never heard of an action being brought to procure the issue of a writ of habeas corpus, and my attention has not been called to any case of the sort. This procedure to my mind is entirely novel. Eversley on Domestic Relations, 2nd ed., p. 496, propounds two methods by which a parent may obtain the custody of his child; one is by writ of habeas corpus, the other by application to the Court of Chancery. A writ of habeas corpus is obtained by application to a Court or Judge by motion or Chambers summons, or it is obtained sometimes from a Judge ex parte. The application to the Court of Chancery is by petition, and, in my opinion, a Court can only be seised of its jurisdiction by the ordinary practice and procedure applicable to the character of the relief claimed. There are no two sides to this Court; law and equity are administered from the same seat and at the same time; but, if a person is making an application to its exercise of equitable justice he must come by the regular procedure, and if the procedure for the relief is to come by petition he must apply by petition. Rule 1 of the Judicature Ordinance, which provides that "every action except as otherwise provided shall be commenced by writ of summons in form A of the schedule," makes no alteration in the practice in that respect, because sec. 21 of that Ordinance applies the practice and procedure existing in England on 1st January, 1898, to the practice and procedure here, subject to the provisions of the Ordinance. The procedure by petition in such cases, then, would be one of the exceptions referred to in Rule 1, just cited.

I have been referred to two cases, Cassey v. Cassey, 15 Gr. 399, and Munro v. Munro, ib. 431. In the first case, the statute of Upper Canada provided for the sale of an inchoate right of dower upon petition to the Court under the Act, and the Act gave the Court power to sell. VanKoughnet, C., held that the petition was merely the pro-

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cedure pointed out, and that, the Court having power to sell, he could exercise it under decree upon bill filed. Munro v. Munro was a suit for alimony, and the prayer of the bill also asked that the custody of the children who were under twelve years of age should be committed to the mother, the plaintiff. The bill had been taken pro confesso, and Mowat, V.-C., on looking at the statute relating to the custody of infants, observed that it provided for the jurisdiction being exercised on petition, but he stated that a bill might, he presumed, be regarded as a petition for the purpose of the Act, and he referred to Cassey v. Cassey, and gave relief accordingly. I, with due deference, must say that I hesitate before following these cases. It seems to me, as I before stated, that the jurisdiction has to be exercised under the method pointed out by the practice, and, in so far as applications for writs of habeas corpus are concerned, it would in many instances create unnecessary expense if it was allowable for an action to be brought and brought down to issue by pleadings, and have it set down for trial. I am satisfied in this case that the plaintiff cannot succeed in the action which he has brought, and the case therefore comes within what was laid down by Chitty, J., in Republic of Peru v. Peruvian Guano Co.; and I am also satisfied that the Court cannot grant the relief asked for when an action has been brought in this way, and that the case comes therefore within Dreyfus v. Peruvian Guano Co.

It was urged that the defendant had not come promptly for relief, and that he has also debarred himself from such relief by pleading. It was held in Tucker v. Collinson, 34 W. R. 354, that the Court could strike out a frivolous or vexatious action even after reply. I think in this case the action is so clearly bad that plaintiff ought not to be allowed to keep his action alive.

It was also urged that a pleading should not be struck out which is capable of amendment, and that this statement of claim could be amended by claiming a decree that the plaintiff is entitled to the custody of the child. Such a declaration would be frivolous, because that is self-evident. One might as well, if an action is brought for the detention of a horse which the plaintiff says is his property, ask for a declaration of the Court that the horse is his property.

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It was further urged that I could only strike out the statement of claim. Rule 151 authorizes the Judge to go further than that, because it authorizes him to dismiss the action. I will order therefore that this action be dismissed with the costs of this application and of appearance. The defendant will be entitled to no costs of his pleading.

MANITOBA.

MATHERS, J. FEBRUARY 4TH, 1907.

CHAMBERS.

TELLIER v. SCHLIEMANS.

Administrator Pendente Lite — Appointment of — Jurisdiction of Court of King's Bench—Jurisdiction of Referee in Chambers.

Appeal by plaintiff from an order of the Referee in Chambers dismissing an application by plaintiff for the appointment of an administrator pendente lite of the estate of Dennis D'Aoust, deceased.

The action was brought to set aside the will of the deceased and for other relief.

After the action had been partly tried, and the further trial had been adjourned, plaintiff applied for the order. The Referee dismissed the application upon the merits, and the plaintiff appealed.

J. E. O'Connor, for plaintiff.

A. Haggart, K.C., for defendant.

MATHERS, J.:—It was objected before me, and I understand the same objection was taken before the Referee, that he had no jurisdiction to make the order, or entertain the application.

In England the jurisdiction to make an order such as is asked for here is vested in the Probate Division, and when the necessity for the appointment of an administrator pendente lite arises in any of the other Divisions of

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the High Court of Justice, the practice is to make an application to the Probate Division. That this is the course of practice is shewn by such cases as Horrell v. Willis, 1 P. & D. 103; Tichborne v. Tichborne, ib. 730; and Bellew v. Bellew, 34 L. J. P. M. & A. 125.

The Court of Probate, in such cases, derived its authority from s. 70 of the Court of Probate Act, 1857, which provides that pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate, or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person.

When this Court was established upon the creation of this province, it was vested with the jurisdiction of all the Superior Courts in England having cognizance of property and civil rights, including the Court of Probate.

In this way the Court acquired the authority to appoint an administrator pendente lite, like that which the Court of Probate had under sec. 70 of the Court of Probate Act of 1857.

The subsequent creation of Surrogate Courts in this province did not take away this jurisdiction, as, by each of the several Acts relating to Surrogate Courts it is expressly provided that the same shall not be construed as depriving this Court of any jurisdiction it may have in such matters: R. S. M. 1902 ch. 41, sec. 18.

It does not seem to me, therefore, that the enactment of what is now sec. 39 of the Surrogate Courts Act, R. S. M. 1902 ch. 41, has in any way either enlarged or abridged the jurisdiction of this Court relating to probate or administration matters, except that sec. 39 of our Act does not limit the grant to personal estate, as sec. 70 of the English Act does. Be this as it may, I know of no other authority for the appointment of an administrator pendente lite, than the two sections named.

The English Act vested the appointment in "the Court of Probate," and our Act vests it in "the Court in which such suit is pending." By Rule 449 a Judge in Chambers may exercise the same powers and jurisdiction in respect of the business brought before him as is exercised by the Court. By virtue of this Rule a Judge in Chambers could make this appointment, but I know of no Rule which confers the same

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power upon the Referee. It was argued that, as the Referee has the powers of a Judge in Chambers under Rule 27, except as to the matters therein excepted, and a Judge under Rule 449 can in Chambers exercise the powers of the Court, therefore the Referee can do the same, except as to the matters excluded by Rule 27. By the same logic the Referee can try actions in Chambers, as such are not amongst the matters excepted by Rule 27. The argument need only be stated to reveal its unsoundness.

As, in my opinion, the Referee had no jurisdiction to entertain the motion, I dismiss the appeal, with costs in the cause to the defendants in any event.

MANITOBA.

MATHERS, J. JANUARY 15TH, 1907.

TRIAL.

STEELE v. PRITCHARD.

Fraud and Misrepresentation—Purchase of Land—Actionable Misrepresentation — No Belief in Truth — Damages—Value of Land.

The plaintiffs, Aza B. Steele, Max Leon Powell, and Add Barney Buell, three land buyers from the State of Vermont, claimed $23,000 damages from the defendants, A. W. Pritchard and J. O. Smith, in connection with the sale of certain lands made by the Ontario and Saskatchewan Land Corporation.

In June, 1906, the three plaintiffs became interested in a large tract of land consisting of 47,000 acres lying south of the Canadian Northern Railway Company's line in the Lasburn district, near Lloydminster, their attention being first directed to the property by a real estate agent at Regina. It was ascertained there that the defendants had a short option to purchase the property, and the representative of the plaintiffs subsequently met the defendant Pritchard in Winnipeg and opened up negotiations with him for the land, with the result that the plaintiff Steele agreed to buy the lands in question from Pritchard at $6.60 per acre. The plaintiff Steele took his two co-plaintiffs into partnership with him, and carried out the purchase as

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agreed. Shortly after buying the land, the plaintiffs alleged that they became aware that the lands bought by them were not all the lands in the 6 townships in question owned by the Ontario and Saskatchewan Land Co., who claimed to have purchased the same from the Canadian Pacific Railway Co., whereas the plaintiffs alleged that the defendants represented to them that the lands that they were buying constituted all the lands ever owned in the 6 townships by the Ontario and Saskatchewan Land Corporation.

The plaintiffs therefore alleged that the tract had been "culled," and that the lands taken out of the large parcel were more valuable than those sold to them, and that consequently they sustained damages of at least $3 an acre on the lands alleged to have been "culled" out. They therefore brought their action to recover from the defendants some $23,000.

The defendants denied that they ever made the representations alleged, or that the plaintiffs were induced by any such representations as they claimed, to enter into the contract, and both Pritchard and Smith disclaimed any fraud on their part.

I. Campbell, K.C., and C. T. Wilson, for plaintiffs.

C. W. Bradshaw and T. H. Johnson, for defendants.

MATHERS, J.:—I find, as I intimated at the trial, that the plaintiff Steele was not induced by any representations of the defendants to purchase the lands in question. I am convinced that before he came to Winnipeg from Regina he had made up his mind to buy, and his visit to Winnipeg was for the purpose of attempting to finance the project. As against the plaintiff Steele, therefore, the action must be dismissed.

As to the other plaintiffs, the case stands differently. There is a preponderance of evidence in favour of them, and I find that the defendants did represent to them that that block of land was the entire original selection, and all that the selling company ever owned in the 6 townships named, and that these two plaintiffs were induced by such representation to become co-purchasers with Steele of this block of about 47,000 acres of land at $6,60 per acre. I find that the representation was not true, as the Ontario and Saskatchewan company had previously sold out of their

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original holding 7,800 acres, and the block in question represented the balance only of the company's original holding in these townships. I find, also, that the defendants, at the time the representations were made, had no information on the subject at all, and could not therefore believe it to be true. From the examination of the defendants for discovery put in evidence, it is impossible to find otherwise than that they had no belief in the truth of the representation when made.

These facts bring the case within the law as laid down by Lord Herschell in Derry v. Peek, 14 App. Cas. 337, and entitle the plaintiffs Powell and Buell to a verdict.

The question of what the damages are involves a great deal of difficulty. These plaintiffs are entitled to be placed in the position they would have been in if the representation had been true. In other words, the damages to which they would be entitled would be the difference between the average value of the lands received and the average value of the whole original holding of the selling company. I find that the 47,000 acres received were worth the price paid, viz., $6.60 per acre. As to the value of the 7,800 acres, the evidence was very conflicting. Benjamin J. Smith, an estate agent residing at Lashburn, in the vicinity of the lands, places the value of these lands at the date of the sale at $10 per acre. Newton, who made the closest examination of any witness, places the difference in value at $3 per acre, while, on the other hand, E. A. Bredin, a land examiner of long experience, says the 47,000 acre tract is worth $1 per acre more than the 7,800 acre tract. He, however, did not, owing to limited time at his disposal, make a very complete inspection. The witnesses all agree that the 47,000 acre tract is much more rugged and broken than the 7,800 acre tract, the surface of which is fairly uniform. I was most impressed by the evidence of Benjamin J. Smith, who resides in the locality, and that of E. A. Bredin, whose long experience as a land examiner entitles his opinion to respect. Both these witnesses are disinterested and appeared to be entirely free from bias. There is a difference between them of $4.40 per acre, one giving his opinion that the 7,800 acre tract is worth $10 per acre and the other $1 per acre less than the 47,000 acre block. With this great diversity of opinion to guide me, I have to arrive at the best conclusion I can.

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I therefore find that the 7,800 tract is worth $2.20 per acre more than the 47,000 acre tract. The exact acreage sold was 47,102.61 acres, and the exact acreage of the excluded portion was 7,840 acres. The average value per acre of the whole block would be $6.91. It would thus appear that, if the defendants' representations had been true, the land bought by the plaintiffs would have been worth 31 cents per acre more than it was, and the damages would therefore be $14,601.80.

The plaintiffs have, however, sold 32-47 interest in the land, and, although it is stated that they sold subject to and with the same representations, there is no evidence that any claim has been or ever will be made upon them in respect of such representations. And, even if it was made, it is not probable they would be held liable, as they made it with an honest belief in its truth. I think, therefore, they can only recover in respect of the interest retained, namely, 15-47 interest. Powell says the interest of each plaintiff is a 5-47 —and, as Steele cannot recover, the damage recoverable by the plaintiffs is 2-3 of 15-47 or $3,106.76.

There will be judgment for the plaintiffs Powell and Buell against the defendants for $3,106.76 and costs, except such costs as were occasioned by Steele having been joined as plaintiff. There will be judgment for the defendants against the plaintiff Steele for such costs as were occasioned by his having been made a plaintiff.

MANITOBA.

MACDONALD, J. FEBRUARY 13TH, 1907.

TRIAL.

SMITH v. GLINES.

Building Contract — Extras — Architect—Set-off—Cost of Completing Work.

Action by a contractor for the price of work done for and materials supplied to defendant and to enforce a lien therefor under the Mechanics' and Wage Earners' Lien Act.

E. Anderson and W. Moran, for plaintiff.

A. Haggart, K.C., and E. J. Tarr, for defendant.

MACDONALD, J.:—Upon the opening of the case the plaintiff's counsel intimated that he abandoned his remedies

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under the Mechanics' and Wage Earners' Lien Act, and would rely upon his personal rights against the defendant.

The defendant advertised for tenders for the construction of a residence in Hargrave street in the city of Winnipeg, according to plans, specifications, and conditions of contract prepared by Messrs. A. & W. Melville, architects. The plaintiff submitted a tender to do the carpenter work for the sum of $3,400, and in his tender adds the following words: "This offer allows $1,400 to purchase all the materials described as finishing, also maple flooring, which may be purchased by proprietor if so determined." This tender was accepted, and the plaintiff entered upon the work and worked until 28th October, when he was dismissed, and others were put on to complete the work.

The plaintiff alleges that the proprietor elected to supply the material described as finishing and also maple flooring. The evidence does not support this contention, and I find that plaintiff was to supply all the material referred to at $1,400.

The architects had the power under the general conditions of the contract to dismiss the contractor, should the work not be proceeded with as quickly as they might deem right, and, although there was delay in proceeding with the work for which the architects' powers might be exercised, yet the principal delay being by reason of non-delivery of the finishing material, for which the contractor cannot be held responsible, I find that the defendant cannot succeed on his claims for damages for such non-completion.

The plaintiff is therefore entitled to the contract price agreed upon, with extra work performed by him, less the moneys that he has received and the cost to the defendant of completing the work.

I find the plaintiff entitled to the following extras: . . . aggregating $550, which added to the contract price, $3,400, makes $3,950.

The defendant asserts that it cost him $1,098 in wages to complete the work, although his counterclaim is for $690. In view of the fact that the witness Peterson, called on behalf of the defendant, tendered to put down the hardwood finish (which he says would complete the building) for $200, and also from the fact that the architect in his statement shewing basis of plaintiff's last certificate, esti-

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mates the cost of finishing at $500, I cannot but conclude that the cost of completing has been most extravagant, and a great portion of it consists of work not within the contract of plaintiff.

I find that the cost of completing the work, together with the cost of materials for which defendant had to pay, will at least equal the claim of the plaintiff, and I therefore dismiss the action without costs to either party.

MANITOBA.

MATHERS, J. FEBRUARY 18TH, 1907.

CHAMBERS.

REX v. HUNTER.

Certiorari — Application for—Forum—Judge in Chambers—Court in Banc not Sitting—Practice.

Motion by defendant for an order directing a writ of certiorari to issue to bring up the record of a conviction of defendant for peddling without a license, contrary to the provisions of a municipal by-law, in order that such conviction might be quashed,

E. F. Haffner, for the applicant.

B. D. Macdonald (Hudson & Co.), for the municipality.

MATHERS, J.:—As a preliminary objection it was argued by the municipality that a Judge in Chambers has no jurisdiction to direct the issue of a writ of certiorari. In support of this contention Regina v. Beale, 11 Man. L. R. 448, and In re Dupas, 12 Man. L. R. 653, were relied on.

In Regina v. Beale, Chief Justice Taylor held that a single Judge sitting in Court had no jurisdiction to quash a conviction under sec. 337 of the Criminal Code, but that the motion must be made to the full Court.

A short time afterwards the matter came before the same learned Judge again in Regina v. Crowthers, 11 Man. L. R. 567. The motion in that case was also made to the Court presided over by a single Judge, and was for a writ of certiorari to bring up the record of a conviction under

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the Liquor License Act. After an exhaustive reference to the Ontario cases, the Chief Justice held that, although the conviction was under a provincial statute, it was a criminal matter, and a single Judge had no jurisdiction, but at the urgent request of both parties he entertained the motion and disposed of it on the merits.

These two cases only go the length of deciding that a single Judge sitting in Court has no jurisdiction in certiorari matters.

The practice in England prior to 1870 was to apply for the writ to the full Court in term time and to a Judge in Chambers out of term, but the application to quash the conviction, when returned, was always made to the full Court.

In Gude's Crown Practice, vol. 1, p. 216, it is stated that a writ of certiorari to remove an order of sessions "may be procured either in term or vacation. If in vacation, an attendance at the Judge's Chambers for half an hour at the time appointed in the notice, and a fiat for such writ is prepared by your clerk in Court, and signed by the Judge, but the writ itself is not signed." Upon a return being made to the writ, a motion to quash was put upon the Crown paper for argument in term. It is stated at p. 221 that the practice in certiorari to remove convictions is, in some respects, different from that respecting orders of sessions, and the author proceeds to mention the differences, one of the chief being that in the case of a conviction there must be an affidavit stating the objection to the conviction "in order that the Court or Judge may form an idea of the probability of success of the party removing," etc.

The form of notice to be served on the convicting justice is given in Gude's Practice, vol. 2, p. 567, and is a notice of an application to be made to the Lord Chief Justice of the King's Bench, on a day named, "at his Chambers in Serjeant's Inn, Chancery Lane, London, for a writ of certiorari to remove into said Court all and singular records of conviction," etc.

A reference to Short and Mellor's Crown Office Practice, pp. 132 to 140, shews that the modern English practice is not materially different from that which prevailed prior to 1870, and that during the sitting of a Divisional Court the application for the writ is made to such Court and at other times to a Judge in Chambers, but in either event the mo-

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tion to quash is made to a Divisional Court. See also Paley on Convictions, 8th ed., p. 456.

In Ontario it was early settled that a writ of certiorari could be moved for in Chambers, but, in such case, it was returnable to the full Court, where all further proceedings were had: In re Burley, 1 C. L. J. 34.

In Re Dupas, 12 Man. L. R. 653, the question considered by the Court was, whether, even in term, in view of secs. 37 and 45 (now 53) of the King's Bench Act, an application for a writ of certiorari to quash an order of a justice of the peace for wages under the Masters and Servants Act should not be made in Chambers, but the point was left undecided. It does not touch the question of the right to move in Chambers for the writ out of term.

By sec. 9 of the Court of Appeal Act the terms during which the Court of King's Bench should sit in banc are abolished, and the Court now sits in banc only when called together by the Chief Justice, or senior puisne Judge, in his absence. By sec. 7 of the same Act the jurisdiction of the King's Bench in banc may be exercised by the Court of Appeal, and by sec. 10 five terms per year are provided during which the Court of Appeal shall sit in banc.

In my opinion, an application for a writ of certiorari is properly made to a Judge in Chambers at any time when the Court of Appeal, or the full Court of King's Bench, is not sitting, but all further proceedings, after the return, must be taken in one or other of those Courts.

As neither of those Courts were sitting when this application was made, I overrule the objection.

MANITOBA.

MATHERS, J. FEBRUARY 19TH, 1907.

TRIAL.

CANADAN PORT HURON CO. v. BURNETT.

Charge on Land—Lien Note or Agreement—Failure to Register — Subsequent Assignment for Benefit of Creditors — Priority—Registry Act—Lien Notes Act.

Action to establish and enforce a lien upon land.

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The action was tried upon a statement of facts agreed to by both parties, as follows:—

The following facts are to be taken as if proven at the trial by proper evidence, and the case is to be decided on these admissions without further evidence being called on either side:—

For the purpose of this trial and any appeal therefrom it is admitted by all parties as follows:—

1. The defendant Burnett executed under seal and delivered the agreement between himself and the plaintiffs bearing date 18th August, 1904, on such date, and a copy of such agreement is hereunto annexed and made part of these admissions.

2. The agreement was for the sale and purchase of certain machinery therein described, at and for the price or sum of $3,800, payable with interest as therein provided.

3. Default exists under such agreement, entitling the plaintiffs to recover herein from the defendant Burnett the full amount of their claim and costs, less the amount realized or which may be realized by them upon the sale of the said machinery (after deducting all expenses of resuming possession, repairing, refitting, and reselling the same, including 10 per cent. commission to the plaintiffs on the price at which resold), the amount due to be settled by the registrar as hereinafter agreed.

4. The said agreement contained the following provisions: "And for the further securing payment of the price of the said machinery and the said notes and all other obligations given therefor and the cost of drawing and registering the mortgage, the purchaser agrees to deliver to the vendors at the time of the delivery of the said machinery as herein provided, or at the option of the vendors at any time thereafter, upon demand, a mortgage on the lands hereinafter referred to and set opposite the signature of the purchaser at the foot hereof, in the statutory form, containing also the special covenants and provisions in the mortgages usually taken by the vendors. The purchaser hereby further agrees with the vendors that they shall have a charge and specific lien for the amount of said purchase money and the interest, or the amount of the said purchase price, less the amount realized by the vendors after deducting the costs, charges, and expenses aforesaid, should they take and resell the said machinery under the foregoing

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powers or any of them (whether such amount be considered liquidated damages or the purchase money or price) or the balance thereof, upon the said lands and upon any other lands the purchaser now owns, or shall hereafter own, or have any interest in, until the said purchase money and any or all obligations, notes, or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes, or renewals thereof, and interest as hereinbefore mentioned."

5. The plaintiffs have not as yet received such mortgage from the defendant Burnett.

6. The said agreement is not registered against the said lands or any of them.

7. That on 18th August, 1904, the defendant Burnett was the owner of the east half of section 15 in township 6 and range 3 west of the first principal meridian, subject to certain mortgages thereon, which lands are situate in the land titles district of Carman, and was also on such date the owner of the north-west quarter section 14 in township 6 and range 8 west, subject to certain mortgages thereon, which lands are situate in the land titles district of Morden.

8. The plaintiffs' action was commenced on 14th October, 1905, and certificate of lis pendens registered on 15th October, 1905, in the Land Titles Offices at Carman and Morden, being the proper offices for such purpose.

9. The defendant Burnett made an assignment for the benefit of his creditors, under the Assignments Act, to the defendant Haverson, on 20th October, 1905, which assignment was registered in the land titles office at Carman, in the general register, on 7th November, 1905, and in the land titles office at Morden, in the general register, on 13th December, 1905, and a copy of such assignment is hereto annexed and made part of these admissions.

10. The questions to be determined by the Court are:—

(a) Are the plaintiffs entitled to a lien for the amount of their claim on the said lands and premises as against the defendants?

(b) Are the plaintiffs entitled to a mortgage upon the said lands, and if so are they entitled to such mortgage in priority to the claim of the defendant Haverson?

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11. It is agreed that judgment shall be entered in favour of the plaintiffs, or the defendants, in accordance with the above findings, and that the Court is to dispose of the costs of all parties of this action.

12. Nothing herein contained shall affect or prejudice the rights of any of the parties hereto to appeal from any judgment entered upon such findings.

13. It is further agreed that the plaintiffs, irrespective of the answers of the Court to the above questions, are entitled to judgment against the defendant Burnett for the amount of their claim and the costs of this action, and it is agreed that judgment shall be entered for the plaintiffs referring it to the registrar of this Court to ascertain the amount due by the defendant Burnett to the plaintiffs, after crediting him with the proceeds realized from the sale of the said machinery, less the expenses of resuming possession, repairing, refitting, and reselling the said machinery, which expenses are to include a 10 per cent. commission to the plaintiffs on the price at which the machinery is resold.

14. In the event of the plaintiffs being found entitled to a lien upon the said property, then the judgment shall contain the usual provision for the sale of the property in default of payment within the usual time, and in the event of the plaintiffs being found entitled to a mortgage, then the judgment shall contain the usual directions for the execution and delivery of the said mortgage, and also directing a sale of the said property in default of payment within the usual time and in default of such sale, foreclosure.

A. E. Hoskin, for plaintiffs.

A. B. Hudson, for defendant.

MATHERS, J.:—The language of the deed of assignment is as follows: "Now this indenture witnesseth that in consideration of the premises and of one dollar now paid by the said trustee to him (the receipt whereof is hereby acknowledged), the said debtor, according to his estate and interest therein and as fully and effectually as he lawfully can or may by these presents, doth hereby grant, bargain, sell, assign, transfer, convey, and assure unto the said trustee . . . all the real estate, lands, tenements, and hereditaments of the said debtor . . . of or to which he may have any estate, right, title, or interest, of any kind or description, with the appurtenances."

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What property is passed by a deed of assignment so worded? It seems to me the deed purports to deal only with such estate or interest in the land as the assignor then had. I cannot construe the words "according to his estate and interest therein" in any other way.

Sections 6 and 7 of the Assignments Act do not help the assignee, as the assignment is not in the words, or to the like effect of the words, used in sec. 6, and sec. 7 provides that whether the assignment is or is not executed in accordance with the Act, or is or is not expressed to be pursuant to the Act, it shall vest the estate "thereby assigned" in the assignee for the benefit of creditors. This latter section does not assume to give the deed of assignment any larger effect in the way of passing property than on its face it imports to have.

Prior to the execution of the assignment the assignor had given the plaintiffs an equitable interest in the land which was still in existence. By the language of the deed the assignor has, in my opinion, excepted from its operation the plaintiffs' equitable interest, and the assignee takes the land subject to the plaintiffs' charge.

Having arrived at the conclusion that by the terms of the deed itself the assignee takes subject to the plaintiffs' claim, neither the Registry Act nor the Lien Notes Act can have any application. Section 72 of the former Act provides that no equitable interest shall be deemed valid against a registered instrument, executed by the party whose land or interest in land is affected by such equitable interest. Here the interest of the assignee is not affected by the plaintiffs' equitable charge, because the only interest the assignee has is what is left after the equitable charge has been satisfied. The document or instrument declared to be void by sec. 7 of the Lien Notes Act is one which affects the same estate or interest in lands as is claimed under the registered instrument. In other words, both documents must purport to deal with the same estate or interest in the land, and not one with one estate or interest and the other with another and entirely different estate or interest.

As what I have said thus far is sufficient to dispose of the action, I have not considered the other very important questions of law argued at the trial.

There will be judgment declaring the plaintiffs entitled

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to a lien, and also to a mortgage upon the lands in question for the amount of their claim as against the defendant.

The judgment will be in the terms agreed upon in the written statement of facts put in evidence.

The plaintiffs are entitled to the costs of the action.

BRITISH COLUMBIA.

(VICTORIA.)

JANUARY 21ST, 1907.

FULL COURT.

BRITISH COLUMBIA MILLS TIMBER AND TRADING CO. v. HORROBIN.

Mechanics' Liens—Material Men—Action to Enforce Lien—Payment or Satisfaction — Appropriation of Payment made by Contractor to Material Men with Owner's Money —Hardship upon Owner—Suggested Legislation.

Appeal by plaintiffs from judgment of HENDERSON, Co.C.J., in favour of defendant Mrs. Henshaw, in an action to enforce a mechanic's lien.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

E. P. Davis, K.C., for plaintiffs.

J. H. Senkler, K.C., for defendants.

HUNTER, C.J.:—Action to enforce a mechanic's lien against the property of the defendant Mrs. Henshaw, a married woman, and against the mortgagee, J. H. Senkler. She entered into a contract with her co-defendant Horrobin to build a house on the lots in question, and Horrobin contracted with the plaintiffs for the furnishing of certain timber and building materials for the house, the completion of the delivery of such materials taking place on 30th January, 1905. The amount claimed was $948.45, and on 16th February the lien was filed in the County Court at Vancouver.

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The main defence was payment or satisfaction based on the following facts. On 26th September, 1904, Horrobin, who was at the time indebted to plaintiffs for building materials supplied for the construction of several houses, including Mrs. Henshaw's, gave a 30 day note to plaintiffs for $1,700. On or about the due date (29th October) Horrobin gave plaintiffs a cheque on his bank, the Bank of Hamilton, for $1,000, thereby overdrawing his account to nearly that amount, which cheque the plaintiffs claim to have applied on account of the note, in the absence of any appropriation by the debtor. A few days afterwards, the defendant Senkler's firm, on behalf of Mrs. Henshaw, gave Horrobin a cheque on their bank for $1,200, stated on the face of it to be "re Mrs. Henshaw," which Horrobin indorsed over to the Bank of Hamilton, thereby making good his overdraft. Now, had the cheque to Horrobin for $1,200 "re Mrs. Henshaw" been indorsed over by him to plaintiffs, it might well have been that that would be sufficient to shew an appropriation by Horrobin of the money to meet the debt for the materials supplied to Mrs. Henshaw; or if it was not sufficient, that it might have afforded foundation for an argument that, as plaintiffs are invoking the equitable jurisdiction in endeavouring to enforce their lien, seeking equity they should do equity, and therefore that they should credit Mrs. Henshaw with the amount of the cheque.

But, however that may be, that is not what happened here, because, as already stated, instead of indorsing over the cheque, before he received it Horrobin had paid plaintiffs $1,000, which he had got from the Bank of Hamilton on the strength of Mrs. Henshaw's promise to give him the cheque, and not having appropriated it to any particular debt, the plaintiffs applied it in reduction of the note then overdue, which they had a legal right to do; and it is not shewn that the plaintiffs knew at the time that Mrs. Henshaw had anything to do with the payment of this $1,000, or that she was the real source of the fund.

Evidence was given that Horrobin told Mrs. Henshaw that he had paid plaintiffs $1,000 on her account, but of course this was not receivable as against plaintiffs.

Before the trial Horrobin was so severely injured that he was unable to give evidence, so that the statement of plaintiffs' accountant that he made no appropriation of the payment was not contradicted; but I do not gather that

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any application was made to postpone the trial in order to obtain his evidence, and therefore I think this defence fails.

Another objection was that there was nothing to shew when the completion of the delivery took place; but it was proved by a delivery slip that 2,800 feet of lumber was delivered on 30th January, 1905, and this evidence was not, so far as I can see, successfully impeached by the defence.

It was also argued that no request by the owner was proved, but of course there can be an implied request as well as an express request, and it seems clear that Mrs. Henshaw must be deemed to have authorized Horrobin to procure the materials where he thought fit, as it was under her agreement with him that he was building the house, and the case of Anderson v. Godsal, 7 B. C. R. 404, so far as I can see, has no application, as that was a case where the owner had given a working option on a mine, and the lien claimants having done work for the optionee, it was held that they had no claim as against the owner, but only as against the optionee.

It was also suggested that a material lien was good only until the materials were put in the building, but it is clear that by sec. 7 of the Act of 1900 a lien is given on both the land and building.

The claim, however, was brought for too much, as it was admitted at the trial that there were shortages in delivery amounting to about $50, and it is not any too clear that Mrs. Henshaw was not entitled to the rebate which the course of dealing between plaintiffs and Horrobin shewed that he was getting. As Mrs. Henshaw was not called on to keep account of what was delivered, and therefore had no way of testing the accuracy of plaintiffs' accounts, and as she is being made responsible for the contractor's debts, I think it was incumbent on the claimants to be able to shew accurately and beyond doubt what the law called on her to pay. As matters stand, it ought to be referred to the Registrar to take the account, if the amount cannot be agreed upon, but, as those who seek to take advantage of a law which compels people to pay other persons' debts are entitled only to strictissimum jus, there should be no costs of the action; but I see no sufficient reason for depriving plaintiffs of their costs of this appeal. The costs of the refer-

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ence, if there is one, should be dealt with by the County Court Judge.

The case might well be brought to the attention of the legislature, and if it be proper for a Judge to observe upon the operation of the Act, after having had before him an instance of the hardship which it is liable to work, I would say that the Act might well be confined to wage-earners only, as I see no more reason why a mill should be given a lien for lumber than that a grocer should have a lien on his customer's breakfast table.

IRVING, J.:—In my opinion, the amendments of 1900 recognize the right of a material man to file a lien.

Section 9 is apparently intended to give to the person supplying material a lien on the material supplied by him for the price thereof until it is worked into the building, or until he has been paid. After that sec. 4 comes into play, and the material man's right to a lien is against the building.

The words "at the request of" in sec. 4 are satisfied by the evidence in this case. Mrs. Henshaw, by entering into the contract for the erection of this building, requested the plaintiffs, or authorized Horrobin to request the plaintiffs, to furnish the materials in question.

As to the payment by Horrobin on 29th October of the $1,000, obtained, it may be conceded, from Mrs. Henshaw, the evidence is all one way. Horrobin applied it on his note which fell due that day, and not on account of lumber supplied to Mrs. Henshaw: see the evidence of Pride, the only witness present. But in Corry v. Mecca, [1897] A. C. 286, will be found ample authority for plaintiffs making the appropriation to the note account, where no appropriation has been made by the debtor at the time of payment.

I am unable to agree with the suggestion that plaintiffs' method of keeping books indicates want of good faith. Had Horrobin instructed them to apply this $1,000 on Mrs. Henshaw's account, and had they neglected to do so, then there would be good ground for making this charge; but, as Horrobin was unable to give any evidence, there is no foundation for the suggestion.

The appeal should be allowed.

MORRISON, J., concurred.

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BRITISH COLUMBIA.

(NEW WESTMINSTER.)

BOLE, Co.C.J. FEBRUARY 5TH, 1907.

NEW WESTMINSTER COUNTY COURT.

REX v. HAWTHORNE.

Statutes — Construction — Bush Fire Act—Fire Caused by Sparks from Engine—Conviction.

Appeal from a conviction of defendant by a magistrate for having, within a fire district, in the month of August, 1906, started a fire in a wood for an industrial purpose without clearing a sufficient space surrounding the fire, and not extinguishing such fire before leaving the place. The appellant was adjudged to pay a fine of $100 and the prosecutor's costs, and in default to be imprisoned for 3 months.

G. E. McQuarrie, for appellant.

Howey, for the Dominion Government.

H. L. Edmonds, for the Provincial Government.

BOLE, Co.C.J.:—The evidence, which was very voluminous, clearly indicates that the fire was caused by sparks from appellant's donkey engine, which he was using on the day in question for doing work in connection with his logging camp.

Section 6 of the Bush Fire Act, R. S. B. C. 1897 ch. 84, provides that every person who makes or starts a fire in any woods, etc., or adjacent thereto, during the period from 1st May to 1st October, for cooking, warmth, or any industrial purpose, shall clear a sufficient space surrounding the place in which he is about to light or start such fire, and shall completely extinguish such fire before leaving the place.

Mr. McQuarrie very ingeniously argued that a donkey engine used as in the present case did not come within the meaning of the Act; referring to the amendment ch. 84 of 1902, with respect to locomotive engines, and to ch. 25 of the Ontario Statutes of 1905, which refers to stationary engines causing fires.

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It seems to me that the plainly expressed intention of the legislature was to prevent those disastrous forest fires which every summer cause the loss of vast quantities of valuable timber, and which too frequently are caused by criminal carelessness or reckless indifference in starting fires, and, as a statute is the will of the legislature, the fundamental rule of interpretation, to which all others are subordinate, is that it must be expounded according to the intent of them that made it: Sussex Peerage Case, 11 Cl. & F. 143.

In construing an Act of Parliament we are to consider what the facts were in respect to which it was framed, and the object as appearing from the Act, and, taking all these together, we are to see what is the intention appearing from the language when used with reference to such facts, and with such an object. The facts here and the object are all apparent without stepping out of the Act itself. See per Lord Blackburn, in Caledonian R. W. Co. v. North British R. W. Co., 6 App. Cas. at p. 126; O'Brien v. Cogswell, 17 S. C. R. 461; Rothes v. Kirkcaldy, 7 App. Cas. at p. 702.

It seems to me that the conviction must be sustained. I therefore confirm the conviction and dismiss the appeal with costs.

BRITISH COLUMBIA.

(VICTORIA.)

IRVING, J. FEBRUARY 8TH, 1907.

TRIAL.

BORNSTEIN v. HEISTERMAN.

Collateral Securities — Realization — Judgment — Appropriation of Payments—Account—Trustees—Interest.

Action for an account of moneys received and payment to plaintiff of balance due.

T. Fell, for plaintiff.

E. V. Bodwell, K.C., for defendant.

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IRVING, J.:—The defendant is the trustee of the Green, Worlock, & Co. estate, under an assignment for the benefit of creditors.

The firm of Green, Worlock, & Co., hereinafter referred to as "the bank," assigned on 2nd March, 1894, to three trustees.

On 21st May in the same year two of these trustees were removed, and Mr. Beaven was appointed in their place to carry on the business with Mr. Yates, one of the original trustees.

In October, 1901, Mr. Mackenzie Cleland was substituted as a trustee in the place of Messrs. Yates and Beaven.

After the death of Mr. Cleland, the present defendant, Mr. Bernard Heisterman, was appointed trustee by order of the Court of 3rd December, 1903.

Prior to the assignment, namely, in the year 1892, the bank held for collection, on account of the plaintiff, two promissory notes made by one Morris Moss, the amount thereof being $3,293. At that time Moss was also indebted to the bank in the sum of $5,957.07.

The bank at that time held certain securities belonging to Moss. These had been deposited by him "to secure all and every sum of money which should at any time thereafter be owing by him to the said Green, Worlock, & Co., on any account whatever."

Moss apparently got into difficulties, and it was agreed between the plaintiff and the bank that the bank should sue and obtain a judgment against Moss for the debt due the bank, in addition to the above two claims, and that after they (the bank) had satisfied their proportion of the judgment, they should account to the plaintiff and pay over to him all moneys recovered by them under the said judgment.

Whether the agreement between the bank and Moss was wide enough to make these securities collateral to this judgment has given me much trouble. Its language is very general, but it did seem to me that Moss never intended to empower the bank to take advantage of his difficulties, nor was it intended that the bank should be at liberty to go out into the street and buy up his liabilities and tack them on to the debt he had incurred with the bank; but on consid-

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eration I have arrived at the conclusion that the language of the agreement of hypothecation is wide enough to include a debt (such as the notes sued on) assigned to the bank, and that therefore, when the judgment was obtained, the securities became collateral to the judgment.

On 10th August, 1892, a judgment was obtained by the bank on that understanding against Moss for $9,240.07.

Almost immediately afterwards $30 was paid in to Moss's credit by Mr. S. Leiser.

On 17th January, 1893, the bank, having obtained a receiver in the action in which they had recovered judgment, obtained through him $2,208.25; and on 28th July, 1893, they sold some real estate held by Moss at Port Angles, and from this source they received $4,000. Shortly after this money was received, the assignment of the bank (2nd March, 1894) was made, and the business passed into the hands of the trustees.

On 2nd June, 1897, Messrs. Beaven and Yates, who were then the trustees, received a sum of $1,572.19, proceeds of certain mining shares deposited by Moss with the bank. These sums were more than sufficient by some $945.81 to satisfy the Green, Worlock, & Co., share of the judgment, but, for some reason or other not explained, the trustees overlooked the receipt of the sum of $4,000; at any rate, the trustees continued to sell the securities, and realized therefrom on 13th August, 1897, for shares in the Lanark Mining Company, $650.

The position in September, 1898, was as follows:—

The bank's interest in the judgment had been fully satisfied, and the trustees had in their hands a balance since 2nd June, 1897, of $945.81, and a further sum of $650, received 13th August, 1897.

About that time Mr. Yates, who had been appointed administrator of the Moss estate, was about to declare a dividend of 41 per cent. from the Moss estate. The bank's trustees, still ignoring or forgetting the receipt of the $4,000, filed a claim with Mr. Yates for $9,527.92 as the balance of the judgment debt, and received from him the sum of $3,906.45, which they appropriated as follows, for themselves $2,627.72, for Bornstein $1,278.73.

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This $1,278.73 they, on 7th October, 1898, paid to Bornstein's solicitor, and at the same time obtained from him the sum of $41.50, the costs of obtaining the judgment.

Again in February, 1903, the Moss estate declared a dividend, this time at the rate of 1 4-5 per cent.—the amount due on the joint judgment was assumed to be $9,692.70, the total dividend on that sum being $175, and the pro rata coming to Bornstein on that basis was $58.83. That sum was accordingly paid to him on 19th May, 1903, by Mr. Mackenzie Cleland, then the sole trustee. The difference, $116.17, was retained by Mr. Cleland as the bank's proportion of the dividend.

Mr. Bornstein's solicitor then wrote a letter to Mr. Cleland informing him that, as the bank's share of the judgment had been satisfied long ago, Mr. Bornstein was entitled to all further sums recovered on the judgment, and mentioning in particular the fact that $4,000 had been received in reduction of the bank's claim. Nothing seems to have come of this communication, and matters rested until February, 1904, when Mr. Bernard Heisterman, the present trustee, having been appointed in Mr. Cleland's place, Bornstein's solicitor applied for an adjustment of the account, and continued to apply until 27th April, 1905, when this action was begun. On 10th June, 1905, the statement of claim was delivered.

After the issue of the writ some correspondence took place between the solicitors, and on 25th November, 1905, Messrs. Bodwell & Lawson sent to Messrs. Fell & Gregory $1,637.41 in a letter containing the following expression: "It being understood that this is without prejudice to the question of accounts, which stands to be adjusted between us."

Immediately previous to the writing of this letter certain accounts had been prepared and submitted to the plaintiff's solicitors, viz., exhibit F. 9, 3rd November, 1905, and F. 10, 21st November, 1905, the latter account shewing a balance of $1,637.41 in the hands of the bank to the credit of the Moss estate. This balance was reached by crediting the Moss estate with the balance of $945.81, and $650, proceeds of the collaterals deposited to secure the bank. In this account for the first time the $4,000 credit appears.

On 26th June, 1906, the statement of defence and counterclaim were delivered.

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It appears that after the defendant became alive to the fact that the bank had been paid on a claim for $4,000 more than was due them, he determined to turn back to the trustee of the Moss estate all moneys received by his predecessors in respect of dividends received on such excess claim. This course he, on 4th December, 1905, actually followed, but without notifying the plaintiff's solicitors of his intentions. The plaintiff contends that he should have turned over to him these moneys or sufficient thereof to satisfy the claim which the bank had agreed to collect. I think the defendant was justified in paying back $2,735.83 in respect of the first dividend, and $136.78 in respect of the second,—as these amounts had been obtained by the bank by representing the judgment to be $4,000 greater than it was.

I do not see how the bank's trustee can repudiate the arrangement entered into between the bank and Bornstein. It must be assumed that the notes were duly assigned to the bank before the bank sued Moss, and that Moss was served with the writ on which the judgment was obtained. In what way he or his administrator could require the bank or the bank's trustee to release the securities without satisfying the joint judgment, has not been suggested to me. Neither Moss nor his administrator could claim that the pledging agreement was satisfied or the power of sale thereunder had ceased until he or they had paid all moneys owing by Moss to Green, Worlock, & Co., "on any account whatever."

That seems to dispose of the case, subject to the checking over the figures. The $945.81 balance and the $650 proceeds of the Lanark shares should have been paid over to Bornstein on 2nd June, 1897, and 13th August, 1897, respectively. He is entitled to receive interest from those dates; he is also entitled to receive out of the moneys paid by the administrator of the Moss estate 41 per cent. and 1 4-5 per cent. . . .

The balance due plaintiff is $627.31, with interest from 27th November, 1905.

If necessary, there will be a reference to the registrar to take the accounts.

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BRITISH COLUMBIA.

(NEW WESTMINSTER.)

BOLE, Co.C.J. FEBRUARY 13TH, 1907.

NEW WESTMINSTER COUNTY COURT.

REX v. MORAES.

Criminal Law—Perjury—False Declaration—Marriage Laws —Lawful Hindrance—Marriage with Infant—Consent of Father.

The prisoner was charged with having on 4th November, 1906, committed perjury by falsely stating in a solemn declaration made under the Marriage Act, R. S. B. C. ch. 129, that there was no lawful hindrance to his marriage with one Maud L. Benson, although at the time the said Maud L. Benson was, to prisoner's knowledge, under 21 years of age, and the consent of her father to the marriage had not been obtained, such declaration having been made with intent to mislead the registrar and obtain a marriage license.

W. J. Whiteside, for the prisoner, called no evidence, but argued that neither the indictment nor the evidence led in support thereof disclosed any offence—pointing out that there was no statement in the declaration made by Moraes that could be construed as alleging that the consent of the girl's father to the marriage had been obtained.

W. M. Gray, for the Crown, contended that a clear case had been made out, and that the want of the father's consent was a lawful hindrance to the celebration of the marriage, and prisoner had declared there was no lawful hindrance thereto.

BOLE, Co.C.J.:—It is hardly necessary to say that the criminal law of British Columbia is the criminal law of England as it stood on 19th November, 1858, save so far as the same is altered by enactment of the Parliament of Canada, ch. 144, R. S. C., and that sec. 24 of the Marriage Act declares

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that in all matters relating to the celebration of marriage, the validity thereof, the qualification of the parties, and the consent of parents, the law of England shall prevail, subject to the provisions of the Act itself. It will, therefore, be useful to consider what the English law on the subject is—confining the discussion to the question of consent to the marriage of a minor. By 26 Geo. II. ch. 33, want of this consent rendered the marriage of a minor null and void, but, as this barbarous statute inflicted terrible hardship and led to most disastrous consequences, it and an amending Act were repealed by 4 Geo. IV. ch. 76, sec. 1. Section 16 of this Act, which is, for the purposes of this case, identical with sec. 17 of the British Columbia Act, requires the consent of the father, etc., of a minor to his or her marriage, but the Court of King's Bench in Rex v. Birmingham, 8 B. & C., unanimously held that the absence of such consent did not invalidate the marriage, which, notwithstanding no consent was given, was perfectly valid—and it seems to me that the words of the declaration in our Act are only intended to indicate to the person issuing the marriage license that the persons who are about to be married are not within the prohibited degrees of kindred or alliance, and that there is no other like impediment to destroy the validity of the marriage, but all doubt on the question, I think, disappears when one reads the declaration under 19 & 20 Vict. ch. 119 (Imp.), which states whether either of the parties is a minor or not, and where either is under 21 years of age, that the consent of his or her father, etc., has been obtained, which indicates that lawful hindrance does not necessarily mean or include want of consent. There are several other serious legal difficulties in the way of supporting the charge as laid in the indictment, which, in my view of the case, it is not now necessary to discuss. In my opinion Moraes has not made a false declaration. Vide also Rex v. Dunboyne. 3 C. & K. 1; 6 & 7 Wm. IV. ch. 85; Piers v. Piers, 2 H. L. Cas. 331; Holmes v. Simmons, 18 L. T. 770.

I therefore acquit the prisoner.

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NORTH-WEST PROVINCES.

(CALGARY.)

JANUARY 15TH, 1907.

SUPREME COURT EN BANC.

FRASER v. KIRKPATRICK.

Judgment Debtor—Committal—Neglect or Refusal to Pay—Means to Pay—Evidence—Examination of Debtor—Imperial Debtors Act, 1869, in Force in North-West Provinces.

Appeal by defendant from order of SCOTT, J., 4 W. L. R. 317, committing defendant to prison for 6 weeks or until payment of plaintiff's judgment, if sooner paid, for his contempt in not having paid such judgment when able to do so. The order was made under sec. 5 of the Imperial Debtors Act, 1869.

The appeal was heard by SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, HARVEY, and STUART, JJ.

N. D. Beck, K.C., for the appellant.

O. M. Biggar, Edmonton, for plaintiff.

HARVEY, J.:—It is contended on behalf of the appellant that the Imperial Debtors Act, 1869, is not in force in this province, and, moreover, that the Judge erred in his finding that the appellant had had the means to pay the judgment. With regard to the first objection, it is contended that the Debtors Act, 1869, was not applicable to the conditions of this country, and was not introduced into the country by sec. 11 of the North-West Territories Act of 1886, which provides as follows: "Subject to the provisions of this Act, the laws of England relating to civil and criminal matters as the same existed on the 15th day of July, 1870, shall be in force in the Territories, in so far as the same are applicable to the Territories," etc.

The intention of the Debtors Act, 1869, is indicated by its title, which is "An Act for the Abolition of Imprisonment for Debt, for the Punishment of Fraudulent Debtors,

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and for other Purposes." As is well known, imprisonment for debt had existed in England for many centuries, and it was held by the full Court of Manitoba in Sinclair v. Mulligan, 5 Man. L. R. 17, affirming the judgment of Killam, J., 3 Man. L. R. 484, that the law of England as it existed in 1670 had been introduced into this country by virtue of the Hudson's Bay Company's charter. It would appear from this that the law respecting imprisonment for debt would thereby become a part of the law of this country, and, unless the provisions of the Debtors Act, 1869, abolishing it, can be held applicable to this country, that it would still continue to be the law. I can see no reason for coming to the conclusion that sec. 4, which abolishes imprisonment for making default in payment of a sum of money, with certain exceptions, or sec. 5, which is the section in question, is not applicable to the Territories. Section 5, as far as material, provides as follows: "Subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding 6 weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court: Provided . . . (2) that such jurisdiction shall only be exercised when it is proved to the satisfaction of the Court that the person making default either has or has had, since the date of the order or judgment, the means to pay the same in respect to which he had made default, and has refused or neglected or refuses or neglects to pay the same. Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purposes of such proof, the debtor and any witnesses may be summoned and examined on oath according to the prescribed rules. Any jurisdiction by this section given to the Superior Courts may be exercised by a Judge sitting in Chambers, or otherwise in the prescribed manner."

Section 10 defines "prescribed" as follows: "As respects the Superior Courts of common law, prescribed by general rules to be made in pursuance of the Common Law Procedure Act, 1852. As respects the Superior Courts of equity, prescribed by general rules and orders to be made in pursuance of the Act of the session of the fifteenth and sixteenth years of the reign of her present majesty, chapter eighty."

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It is pointed out that in 1884 an Ordinance was passed in much the same terms as sec. 11 of the North-West Territories Act, and at that time there was no such Court as there is at present, and the law could not have been enforced.

It does not appear to me to be material whether this contention is valid or not, for we have only to consider the effect of sec. 11, which is the law at the present time, and was enacted at the same time that the Supreme Court was established. But it is also urged that the definition of "prescribed" is not applicable. It appears to me to be a sufficient answer to this to say that by sec. 48 of the North-West Territories Act our Supreme Court is given all the powers and authorities by the law of England incident to a Superior Court, and is directed to use all the rights, incidents, and privileges of His Majesty's Courts of common law, Chancery, and Probate in England. With all these powers, it seems to me absurd to say that a law which could be enforced in England, and is declared to be law here, cannot be enforced here. As far as I have been able to ascertain, sec. 10 of the Debtors Act, 1869, has not been amended; but the provisions of sec. 5 are still enforced, though the Rules of the Judicature Act have superseded the prescribed Rules of that section.

It was also urged that the Act was not applicable because various references shewed that it was to be worked in conjunction with the Bankruptcy Act. To this objection it is only necessary to point out that it is not a question of whether the Debtors Act as a whole is in force, but whether certain provisions of it which constitute part of the law of England are applicable and so in force, and, for the reasons I have stated, I am of the opinion that the provisions in question are in force here. In support of this view, I may also refer to the case of In re Bremner, 6 Man. L. R. 73, in which the full Court of Manitoba held that these provisions were in force in Manitoba by virtue of an Act similar to sec. 11 of the North-West Territories Act.

It remains then to consider whether the order made by my brother Scott was wrong on the evidence. Keeping in mind the remarks made by James, L.J., in Esdail v. Visser, 13 Ch. D. 421, that "it would require an overwhelming case to induce the Court of Appeal to differ from the Judge if he says he is satisfied of the debtor's ability to

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pay," and of Jessel, M.R., in Chard v. Jervis, 9 Q. B. D. 181, that "we never ought to overrule the decision of the Court below on a question of fact unless it is clearly made out that the decision is wrong," does the evidence shew that the Judge came to a wrong conclusion? It was held by the Court of Appeal in Ex p. Fryer, 17 Q. B. D. 718, that a debtor, who had the means to pay part but not all of the judgment debt, and neglected to pay it, was liable to committal under sec. 5. It appears to me, then, that the question for this Court to decide is whether the Judge could reasonably conclude from the evidence before him that the debtor had had the means to pay part of the judgment debt, and, if he could, that his order should not be interfered with by this Court. The evidence has been reviewed at length by the learned Judge in his reasons for judgment, and it does not appear necessary for me to say more than that, for the reasons stated by him, and leaving aside the question of whether the moneys received in the conduct of the hotel business by the debtor, and handed over by him to his wife, were really his money or his wife's, there is evidence to justify the conclusions reached.

In Harper v. Scrimgeour, 5 C. P. D. 366, there was no direct evidence of the debtor having any means to pay the debt; but there was evidence of his manner of living from which an inference could be drawn that he had such means. The debtor explicitly denied that he had such means, and stated that he had no such means, but an order for committal was made and affirmed on appeal. In Chard v. Jervis, above referred to, similar evidence was given for and against the application, and an order was made for committal, which was affirmed on appeal to a Divisional Court. On appeal to the Court of Appeal the debtor filed an affidavit, in which he set out in detail his means and expenses, and manner of living, and that the means of his wife were settled on her, and that she had no power to give him anything. On that evidence the appeal was allowed.

In the case now in appeal the evidence, in my opinion, is stronger than in either of the cases cited, and the whole tenor of the cross-examination of the defendant indicates a deliberate intention to conceal, as far as possible, his real means, and in that respect is in direct contrast to the affidavit filed on the appeal in Chard v. Jervis. For this rea-

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son, therefore, and on the authority of these cases, I am of opinion that the order should not be disturbed.

Appeal dismissed with costs.

WETMORE, PRENDERGAST, NEWLANDS, and STUART, JJ., concurred.

SIFTON, C.J.:—Two questions were argued before the Court:—

1. Is the Debtors Act in force in this country?

2. If in force, was there sufficient material in this case to justify the order?

My opinion in regard to the first question prevents the necessity of considering the second.

If the Debtors Act is in force, it can only be by the provisions of the North-West Territories Act bringing into force "all the law of England of 15th July, 1870, applicable to the Territories," and, as that provision was made as an addition to other laws then in force, and not for the purpose of applying all the law of England, the applicability should be clear. And when the liberty of the subject is at stake, there should be close scrutiny of conditions from which the applicability is judged.

In this connection we find that in 1869 the Parliament of Great Britain passed at the same session two Acts which, taken together, constitute a practical consolidation of the law of England in regard to debtors, viz., the Debtors Act and the Bankruptcy Act. These two Acts refer to each other in their wording, and are, in my opinion, plainly intended to be worked correlatively.

It is admitted that the provisions of the Bankruptcy Act are not applicable to this country, and that it was not brought into force under the general provision as to the law of England of 1870; but, in considering its provisions, I find that its effect in England would be, by the discharge of bankrupts, to remove them from the operation of the Debtors Act. There being nothing in this country to take its place, its follows that the Debtors Act, if in force in this country, would practically be a far stronger Act in its effect and would apply to a wider class of persons, and, in some cases, retain debtors longer in gaol than the same Act would in England. It is impossible for me to arrive at the

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conclusion that this could have been intended, or that it would be a proper interpretation of the law as it now exists, and I therefore think the appeal should be allowed.

Appeal dismissed; SIFTON, C.J., dissenting.

NORTH-WEST PROVINCES.

(CALGARY.)

HARVEY, J. JANUARY 17TH, 1907.

TRIAL.

CLARK v. CITY OF CALGARY.

Municipal Corporations—City of Calgary—Special Charter—Non-applicability of Municipal Ordinance—Non-feasance—Non-repair of Highway—Accumulation of Snow and Ice—Personal Injuries from—Action for—Dismissal—Costs.

Action for damages for personal injuries received by plaintiff owing to a fall upon a sidewalk in the city of Calgary, occasioned by the alleged negligence of the defendants, the city corporation, in permitting snow and ice to accumulate upon the sidewalk.

By their statement of defence the defendants pleaded that, even if the facts alleged were true, there was no cause of action against them.

The question of law so raised was argued before HARVEY, J., in Court.

James Short, Calgary, for plaintiff.

John S. Hall, K.C., for defendants.

HARVEY, J.:—The city of Calgary was incorporated and has its powers under Ordinance No. 33 of 1893, sec. 158 of which, as far as material, is as follows: "Every public street, road, square, or other highway within the city shall be vested in the city and shall be kept in repair by the corporation."

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The Municipal Ordinance contains the following section: "87. Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts, and approaches, grades, and other works made or done by its council, and in default so to keep in repair, shall be responsible for all damages sustained by any person by means of such default."

It is urged on behalf of the plaintiff that this provision applies to the city of Calgary, as well as to all other municipalities, because the city's Ordinance does not expressly repeal the Municipal Ordinance as applying to the city, or otherwise exclude its application. Without considering the subject on any other ground, it is only necessary to refer to the definition of "municipality" in sec. 2 of the Municipal Ordinance as "any locality the inhabitants of which are incorporated a rural municipality or town," to shew that this contention cannot be supported. The question then is: Are the defendants liable under their Ordinance? Clause 44 of sec. 117 gives the council power to pass by-laws to compel adjoining owners to remove snow and ice from the sidewalks and for cleaning sidewalks adjoining vacant property of non-residents and property of persons neglecting for 24 hours to clear their sidewalks, and for recovering the expenses by means of a special assessment, and it is admitted that there is a by-law following the terms of this paragraph and imposing a penalty for breach.

The plaintiff refers to Cuzner v. City of Calgary, 1 Terr. L. R. 162, in which our Court en banc in 1888 held the defendants liable under the then Municipal Ordinance, to the terms of which they were subject. I am of opinion that that case is applicable to the present one, and I should consider myself bound by it were it not for certain later decisions of the Supreme Court of Canada and of the Privy Council, which, in my opinion, negative its authority.

In 1896 the Supreme Court of Canada in City of St. John v. Campbell, 26 S. C. R. 1, held the city not liable for damages for non-repair in the absence of statutory provision to that effect. Chief Justice Strong, in delivering the unanimous judgment of the Court, at p. 4 says: "Granting that the corporation had laid down this asphalt way, and was bound as a public duty to repair it, the accident, if it did occur on the public way, was at most occasioned by the mere neglect of the corporation to keep it in repair. Then, assuming that the city was bound as a duty towards

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the public to repair—a point on which I express no opinion, as none is called for in the present case—the respondent clearly has no right of action."

It was suggested that the accumulation of snow and ice might be treated as a nuisance rather than a want of repair, but it appears to be immaterial, for the St. John case, and the Privy Council cases, Municipality of Pictou v. Geldert, [1893] A. C. 524, and Municipal Council of Sydney v. Bourke, [1895] A. C. 433, which it follows, deal with it simply as a case of non-feasance, which this would be in either view.

In the Geldert case, at p. 527 of the judgment, Lord Hobhouse says: "By the common law of England public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from this failure to keep the roads and bridges in proper repair. . . . It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability, it must be shewn that the legislature has used language indicating an intention that this liability should be imposed."

The cases to which I have referred consider all of the cases which might be considered authority for the plaintiff's contention, and explain their inapplicability or overrule them, and appear to me to be conclusive of the present application. The legislative provision in the Calgary Ordinance is in direct contrast to the provisions of the Municipal Ordinance, which is practically the provision of the Municipal Ordinance at the time the Calgary Ordinance was passed, and I find myself unable to come to any other conclusion than that the city's liability is limited to its duty to the public referred to by Lord Hobhouse for breach of which it might be liable to indictment.

It was urged that, if Calgary is free from this liability, it is the only municipality in these provinces that has that immunity. It is a complete answer to that to point out that that is a matter for the legislature and not the Court to consider. If the exception exists and is intentional, it was the right of the legislature to make it so, and if it was acci-

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dental, it is the right of the legislature to alter it if desired.

There was another legal objection raised as to the sufficiency of the notice, but it is not necessary to consider it, in view of the conclusion I have come to on the other point.

The action will be dismissed, but, following the precedent in the Geldert case, without costs.

NORTH-WEST PROVINCES.

(CALGARY.)

JANUARY 20TH, 1907.

SUPREME COURT EN BANC.

REX v. GILBERT.

Criminal Law—Murder—Evidence — Admissibility—Statements of Deceased—Res Gestae—Subsequent Statement —Presence of Accused — Hearsay — Judge's Charge — Evidence—Manslaughter

Crown case resumed by NEWLANDS, J., as to the admissibility of certain evidence given on the trial of the prisoner for murder. The prisoner was found guilty by the jury, and a conviction for murder was recorded, subject to the reserved case.

The case was heard by SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, HARVEY, and STUART, JJ.

W. M. Martin, Regina, for the prisoner.

J. A. Allan, Regina, for the Crown.

HARVEY, J.:—Two men were passing near the scene of the alleged murder about the time it was supposed to have been committed, and their attention was drawn to the accused, whom they saw running with something in his hand, which they took to be a gun, and which the subsequent evidence shews was a gun. At almost the same moment they heard a shout and saw the deceased apparently fleeing

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from the accused and waving his hands and calling to them to stop. The gun was dropped, but the pursuit continued until the deceased reached the witnesses, and on his way to them and when reaching them, he shouted more than once: "Hold on, hold on; he shot me, and he will shoot me again. Hold on, boys, hold on." The first question which is reserved is whether the evidence of these statements was properly admitted, and I am of opinion that this question should be answered in the affirmative. Apart altogether from whether the words were uttered in the presence of the accused, it appears to my mind clear that the circumstances, including the utterance of the words used, were so closely connected with the shooting as to be properly admissible, for, although the witnesses in question did not hear the sound of a shot, another witness did hear such sound, and almost immediately after saw the two men running as they were when they first attracted the attention of the two witnesses first mentioned.

The strongest case which could be referred to against the admissibility of this evidence was Regina v. Bedingfield, 14 Cox C. C. 341, in which Chief Justice Cockburn refused to receive the evidence of a statement made by the deceased to a person whom she met after coming out of the house where the accused was and where the murder was alleged to have been committed. It is easy to see a difference in principle between the two cases. In the present case there was a continuity of circumstances of which the shooting was part and in which the accused was a participant, which did not exist in the Bedingfield case. So that for the purpose of this case it is not necessary to dissent from Chief Justice Cockburn's view, though some of the text writers (Taylor, sec. 583, Phipson, p. 49), express the view that he interpreted the rule too strictly.

In Rex v. Foster, 6 C. & P. 325, a Court consisting of three Judges held admissible a statement made by the deceased in answer to a question by a witness who did not see the act which was the cause of the death, but came up after. This case appears to have been accepted as authoritative, and the principle is given by Taylor, sec. 583, as follows: "The principal points for consideration are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction."

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It appears to me beyond question that the present case falls within this principle and the authority of Rex v. Foster.

The second question reserved is as to the admissibility of evidence of an expression of the deceased at a later time and in no way connected with the res gestæ. An exchange of conveyances was being made by the deceased and the accused, and the witness states that while the deceased was being helped by him across, he turned around and saw the accused, who was about 5 or 6 feet behind, whereupon "he made a big jump into the buggy and said, 'Don't let him knife me.'"

This utterance appears to me to be nothing more than an unequivocal exclamation indicating fear of injury from the accused on the part of the deceased. The principle on which an exception to the rule that hearsay evidence is inadmissible is made in the case of statements made in the hearing of an accused, or in a civil case in the hearing of an opposite party, is that he has an opportunity of denying it, and if he fails to do so, it is some evidence as against him of the truth of the statement. When one considers that the utterance in question is not a statement of fact at all and is not susceptible of denial by the accused, it is at once evident that the principle has no application, and at the same time the principle of exclusion as hearsay has no application. The question appears to me to be one then simply of whether the state of mind of the accused in this respect is material, and if it is, there is no rule as far as I am aware that requires the exclusion of this remark. It seems to me that the evidence of the witness when he said that when deceased saw accused near him "he made a big jump into the buggy" stands in exactly the same position as the evidence of what deceased said, for each indicates the same thing, viz., fear of accused, and nothing more except that the spoken words are less equivocal than the act.

The charge is one of deliberately shooting the deceased, while the defence is that the shooting was purely accidental. If it were shewn that after the shooting the state of mind of the man shot were one of friendliness to the accused, it surely would be deemed to have an important

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bearing on the question in issue, and in the same way evidence indicating aversion and fear have as important a bearing in the opposite direction. Wigmore, in his work on Evidence, points out very fully the difference between the admission of utterances as proof of the truth of the facts stated and their admission to prove a state of mind which he terms their circumstantial use as opposed to the other or testimonial use, and states in sec. 1790 that to the use circumstantially the hearsay rule makes no opposition, "because the utterance is not used for the sake of inducing belief in any assertion it may contain."

For the reason stated, I am of opinion that this evidence was properly admitted.

A third question, though not reserved, was argued by counsel, viz., that the Judge erred in charging the jury that there was no evidence to justify them in finding a verdict of manslaughter.

No one gave evidence of the actual shooting except the accused himself, and his evidence and evidence of admissions made by him before the trial was the only evidence of the actual occurrence. These all concurred in maintaining that the shooting was purely accidental. If the jury had believed this evidence, the only verdict they could have found would have been one of acquittal; but, if they did not believe it, the only conclusion from the evidence was that, the shooting having been established, the intention to effect the natural consequences of the act existed, and that the act was one of murder. It is quite easy to see that a hypothesis could be advanced that the actual facts made the case one of manslaughter, but that the accused, being the only eye witness of the shooting, determined to concoct a story which would enable him to escape the consequence of even that act; but this would be simply a hypothesis, and the jury were bound to bring in a verdict on the evidence and not on hypothesis. I am of opinion that the Judge's charge was right in this respect.

In the result, therefore, the trial Judge's rulings on the two questions reserved and on the other question which was argued should be confirmed, and the conviction should be affirmed.

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SIFTON, C.J., SCOTT, PRENDERGAST, and STUART, JJ., concurred.

WETMORE, J.:—I agree with my brother Harvey that the evidence of the statement made by the deceased Anderson to the witnesses Koch and Dick while coming towards them, and after he arrived there, was properly admitted as being part of the res gestæ. I also agree that there was no misdirection in this case, but I am of opinion that the statement made by the deceased and testified to by McKinnon, namely, "Don't let him knife me," was improperly received in evidence. This statement was offered in evidence as a statement made in the presence and hearing of the accused, and only upon that ground. It was not pretended that it was admissible on any other ground. Evidence of this character is admissible because the jury or judge of fact is able to draw an inference from the conduct, the language, or the silence of the other party in whose presence and hearing the statement is made. Evidently, if the statement was not heard by such party, no inference could be drawn from his conduct, language, or silence. In this case I may say that any inference that might be drawn was to be drawn from the silence of the accused. In order to render such testimony admissible I think that the Judge ought to be thoroughly satisfied that the party accused heard the statement. I will concede that ordinarily, if it is established that the statement was made in the presence of the accused, and that he was at such a distance at the time that the statement would probably be heard by him, this would be sufficient to admit the evidence of the statement. But, if the circumstances are of such a character that render it possible that the statement might not have been heard by him, or render it doubtful whether it was heard by him, evidence of the statement ought not to be received. In this case the witnesses Koch and Dick were not very far distant from where the deceased and the accused were at the time the statement was made, and I think they would have been likely to have heard it. Now, if they did not hear it, I think it is open to doubt whether the accused heard it. I am not prepared, however, to state that I would hold that the evidence of this statement was improperly received if there was nothing further in the case than what I have stated. But it was developed at a subsequent stage of the proceedings that the accused was hard of hearing, and he

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distinctly swore that he did not hear the statement made by the deceased and testified to by McKinnon. This state of facts having come out, in my opinion rendered the testimony of McKinnon as to the statement inadmissible, or, in other words, improperly received. It is urged that, inasmuch as the testimony when received was admissible, it is not rendered inadmissible by testimony subsequently given. I dissent from that proposition. If testimony of this character is received under a mistaken apprehension of fact, it must be considered none the less inadmissible if future developments of facts shew that it ought not to have been admitted. In a case of that sort I am of opinion that either the jury should be discharged from giving a verdict, or the objectionable testimony expressly withdrawn from their consideration by the trial Judge. I am inclined to think that the latter course would have been quite sufficient for the purpose.

It was further urged that no substantial wrong or miscarriage was occasioned by the admission of this testimony. I cannot accede to this proposition either. It is very difficult to state what will or will not influence the mind of a juryman. The remark, "Don't let him knife me" had no direct reference to the shooting; it must be remembered that when the remark was made the accused had no gun with him, and a remark such as "Don't let him shoot me" would not be pertinent, as he had no means of shooting. The words, "Don't let him knife me" might be pertinent, however, and it was a remark from which a juryman might infer "Don't let this man who shot me, as I told you, knife me." Nor can I bring my mind to the conclusion that this was a mere exclamation of fear alone. Doubtless it was an exclamation of fear, but it was an exclamation which not only expressed fear but expressed fear of the accused.

I am of opinion, for the reasons above stated, that the conviction should be quashed and a new trial ordered.

Conviction affirmed; WETMORE, J., dissenting.

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NORTH-WEST PROVINCES.

(CALGARY.)

JANUARY 20TH, 1907.

SUPREME COURT EN BANC.

REX v. LINCOLN.

Constitutional Law—Alberta Medical Profession Act, 1906—Ultra Vires—Dominion Act Creating Province of Alberta—Construction of—British North America Act.

Appeal by defendant from his conviction by the police magistrate for the city of Calgary for practising medicine for gain, not being a registered person pursuant to the Medical Profession Act, upon a case stated by the magistrate under sec. 900 of the Criminal Code.

The appeal was heard by WETMORE, SCOTT, PRENDERGAST, NEWLANDS, HARVEY, and STUART, JJ.

J. A. Allan, Regina, for the appellant.

James Muir, K.C., for the complainant.

WETMORE, J.:—The appellant was convicted before the police magistrate at Calgary for that he did, on 13th December, 1906, in the city of Calgary, in the province of Alberta, unlawfully practise medicine for gain, he not being then a registered person pursuant to the Medical Profession Act, ch. 28 of the statutes of the province of Alberta, 1906. A case was stated by the magistrate under sec. 900 of the Criminal Code, and argued before this Court. The Alberta Act referred to was assented to on 9th May last. Before the passing of that enactment, the Medical Profession Ordinance, ch. 52 of the Consolidated Ordinances, was in force both in the province of Alberta and in the province of Saskatchewan. The appellant did not register under the Medical Profession Act of the province of Alberta, but on 18th May last he did register under the Ordinance referred to; and if that Ordinance was in force in the province of Alberta after the 9th May, the appellant was entitled to practise in Alberta, and the conviction against him was bad.

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By sec. 3 of the Alberta Act, 4 & 5 Edw. VII. ch. 3 (D.), "the provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act, and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more, and not the whole, of the said provinces."

Section 16 of the last mentioned Act also provides that "all laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor . . . existing immediately before the coming into force of this Act in the Territory hereby established as the province of Alberta, shall continue in the said province as if this Act and the Saskatchewan Act had not been passed; subject nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the said province, according to the authority of the Parliament or of the said legislature." Sub-section 2 of this section has no material bearing on the question under discussion. Sub-section 3, however, is as follows: "All societies or associations incorporated by or under the authority of the legislature of the North-West Territories existing at the time of the coming into force of this Act, which include within their objects the regulation of the practice of, or the right to practise, any profession or trade in the North-West Territories, such as the legal or the medical profession, dentistry, pharmaceutical chemistry, and the like, shall continue, subject, however, to be dissolved and abolished by order of the Governor in council; and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities and the division, disposition, or transfer of its property." The provisions of sub-sec. 1 of sec. 16 of the Alberta Act, which I have quoted, are practically the same as those of sec. 129 of the British North America Act, 1867. It is well known that at a session of Parliament held in 1905, what was theretofore known as the North-West Territories were created into the two

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provinces of Alberta and Saskatchewan—the one by the Alberta Act and the other by the Saskatchewan Act, these two Acts being exactly similar as to their contents. Previous to this enactment the legislative body for local purposes was the Assembly of the North-West Territories, and that had legislative authority for the whole of the Territories. Consequently, the Medical Profession Ordinance, which I have referred to and which was enacted by the last mentioned Assembly, was in force for the whole territory now called Alberta and Saskatchewan respectively. The authority to repeal or alter an Ordinance of the Assembly of the North-West Territories is similar to the authority to repeal or alter an Act of the legislature of old Canada enacted before old Canada became created into the provinces of Ontario and Quebec. That question has been decided by the Judicial Committee of the Privy Council in Dobie v. Temporalities Board, 7 App. Cas. 136. In that case the legislature of old Canada passed an Act 22 Vict. ch. 66, which created a corporation having its corporate existence and rights in the provinces of Ontario and Quebec. The legislature of Quebec in 1875 enacted 38 Vict. ch. 64, which assumed to amend and repeal, in so far as the province of Quebec was concerned, 22 Vict. ch. 66, and to thereby, among other things, materially alter the class of persons interested in the corporate funds. The Judicial Committee held that the Quebec enactment was ultra vires. On p. 147, Lord Watson, who delivered the judgment of the Court, after quoting sec. 129 of the British North America Act, 1867, lays down the following: "The powers conferred by this section upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order, therefore, to ascertain how far the provincial legislature of Quebec had power to alter and amend the Act of 1858, incorporating the board for the management of the temporalities fund, it becomes necessary to revert to secs. 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the legislatures of the respective provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation

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on the subject, the legislature of Quebec would have been authorized by sec. 92 to pass an Act in terms identical with 22 Vict. ch. 66, then it would follow that the Act of 22 Vict. has been validly amended by 38 Vict. ch. 64. On the other hand, if the legislature of Quebec has not derived such power of enactment from sec. 92, the necessary inference is that the legislative authority required in terms of sec. 129 to sustain its right to repeal or alter an old law of the Parliament of the province of Canada is in this case wanting, and that the Act 38 Vict. ch. 64 was not intra vires of the legislature by which it was passed." His Lordship then went on to discuss the provisions of sec. 92 of the British North America Act, under which it might be contended that the Quebec Assembly had the power to legislate as it had done. These were paragraphs 7, 11, and 13 of sec. 92.

It must be borne in mind that the legislative authority of the Alberta Assembly is, by virtue of sec. 3 of the Alberta Act, also embraced by sec. 92 of the British North America Act, and is as limited by that Act. In Dobie v. Temporalities Board, at p. 150, Lord Watson, after discussing the rights of the respective legislatures of Ontario and Quebec to legislate upon the subject matter of an Act passed by the old Parliament of Canada before confederation, where the rights and interests involved in the Act were capable of division, proceeds as follows: "In every case where an Act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But in the present case the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators of that province." In the case of the Medical Profession Ordinance the same remarks may be made with equal force. Section 27 of that Ordinance provides that those persons, and those persons only, who are registered under that Ordinance, can practise in the North-West Territories. Section 33 of the Medical Profession Act provides that only persons who have registered under that Act can practise medicine in the province of Alberta. The consequence is that persons who have registered under the Ordinance and have the right to practise in Alberta, are prohibited from doing so by the Alberta Act. I am therefore of the opinion that the Alberta Medical Act is ultra vires the legislature, and that the appellant,

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having been registered under the provisions of the Medical Profession Ordinance, is qualified to practise in Alberta, and that the conviction is bad and must be quashed.

SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ., concurred.

STUART, J.:—I regret, with great respect, that I am unable to agree with the majority of the Court in this case. The real question involved is the authority of the provinces of Alberta and Saskatchewan to enact legislation regulating the right to practise the profession of medicine within their respective boundaries, and, by analogy, their authority to legislate with respect to other professions such as law, dentistry, and pharmacy, is also involved. Prior to the establishment of these provinces, the Legislative Assembly of the North-West Territories had, by Ordinance No. 5 of 1888, incorporated a College of Physicians and Surgeons for the North-West Territories; and, by Ordinance No. 52 of the Consolidated Ordinances of 1898, this college was continued. Provision was made in the Ordinance for the election of a council to manage the affairs of the college and for the registration of duly qualified persons as members thereof. Section 27 of this Ordinance enacts inter alia that those persons only whose names are registered by the council of the college shall be deemed qualified and licensed to practise medicine or surgery in the North-West Territories. Section 34 provides that each member shall pay an annual fee of not more than $2, and this fee is made recoverable as a debt due to the college; but there was no authority given to the council to strike off the name of a member from the register for non-payment of this fee.

This was the condition of affairs when the Dominion statute 4 & 5 Edw. VII. ch. 3, establishing the province of Alberta, came into force on 1st September, 1905. The material sections of the Alberta Act are sec. 3 and sec. 15, subsecs. 1 and 3.

Section 3 of the Alberta Act enacts as follows: "The provisions of the British North America Acts, 1867, to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion as if the said province of Alberta had been one of the provinces originally united except in so far as varied by this Act . . ."

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It may be assumed, I think, that this provision makes sec. 92 of the British North America Act, 1867, applicable to Alberta, and that all the power of legislation therein given to the provinces of Canada are given to Alberta, unless there is something in the Alberta Act which varies the provisions of sec. 92 with respect to the new province. It is not necessary in this appeal to raise the question whether the Parliament of Canada, in exercising the powers given by the British North America Act, 1871, by establishing a new province, has the authority to withhold from such province any portion of the legislative power given by sec. 92. But I am clearly of the opinion that if the Parliament of Canada intended so to do, they ought at least to express that intention in the clearest possible manner, either by the use of express words of by such words as make it absolutely necessary, in order to give any reasonable meaning to those words at all, to hold that that intention must be implied. There are no words in the Alberta Act which expressly limit the application of the provisions of sec. 92 with respect to the province of Alberta. The only clauses which can be held to have any possible reference to the subject are subsecs. 1 and 3 of sec. 16 above referred to. Sub-section 1 enacts that "all laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor . . . shall continue in the said province as if this Act and the Saskatchewan Act had not been passed; subject, nevertheless, except such as are enacted by or existing under Acts of the Parliament of Great Britain or of the Parliament of Great Britain and Ireland, to be repealed, abolished, or altered by the Parliament of Canada or by the legislature of the said province, according to the authority of the Parliament or of the said legislature." As far as the point at present under consideration is concerned, this sub-section does not, in my opinion, affect it at all. The section merely continues the existing law for the time being, leaving it to be altered by the federal or provincial legislatures according to their respective authorities. There is nothing in it to limit the authority of the province to legislate upon all subjects falling properly within sec. 92. There remains then sub-sec. 3, which is as follows: "All societies or associations incorporated by or under the authority of the legislature of the North-West Territories, existing at the time of the coming

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into force of this Act, which include within their objects the regulation of the practice of, or the right to practise, any profession or trade in the North-West Territories, such as the legal or the medical profession, dentistry, pharmaceutical chemistry, and the like, shall continue, subject however to be dissolved and abolished by order of the Governor in council, and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities, and the division, disposition, or transfer of its property."

The societies and associations dealt with by this section are, as the sub-section states, such as have for their object the regulation of the right to practise certain professions within the Territories. It appears to me to be beyond all question that the right to practise medicine is a civil right, and that legislation dealing with it comes within the category of "property and civil rights in the province" as described in sub-sec. 13 of sec. 92 of the B. N. A. Act. The right to legislate upon this subject has been exercised by the Legislative Assembly of the Territories since 1888 without question, and the North-West Territories Act, by sub-sec. 2 of sec. 13, expressly provides that that legislature shall have no greater powers than those given to the provinces by sec. 92 of the B. N. A. Act. If, therefore, the provinces have not the right to legislate on this subject, the North-West Assembly had not either, and the old Ordinance was itself ultra vires. Furthermore, the provinces of Canada have all individually legislated upon this subject since confederation, and the Parliament of Canada itself recognized the fact that such legislation comes properly within the jurisdiction of the provinces by the statute of 1902, 2 Edw. VII. ch. 20, which provides for the establishment of a medical council for Canada, and which, by sec. 6, sub-sec. 3, expressly says that "when all the provinces shall have legislated in effect as aforesaid (i.e., by accepting registration by the medical council of Canada in lieu of provincial legislation), it shall be lawful to appoint and elect in the manner aforesaid the members of the council," and further expressly provides for the case of a provincial legislature repealing its legislation and withdrawing the province from the operation of the federal Medical Act. It is true that a federal Act is not a judicial decision by the Privy Council, but, as stated by Sir Montague Smith in Citizens Insurance Co. v. Parsons, "when the proper construction of the language used in the B. N. A. Act to define the distribution of

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legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered." In the same case it is also stated that "in this statute the words 'property and civil rights' are plainly used in their largest sense." I think there can be little doubt that the provision of the Canadian Medical Act of 1902, above referred to, providing for ratification by provincial legislatures, was inserted with sec. 94 of the B. N. A. Act in view, which gives the federal Parliament power to provide for uniformity of law in regard to property and civil rights, but expressly states that such legislation must be ratified and accepted by the provinces mentioned.

It appears to me, therefore, that, in face of all this legislation, and in the absence of any express authority on the point, we are driven to the conclusion that the right to practise one of the professions is a civil right, that the authority to legislate in regard to it comes clearly within sub-sec. 13 of sec. 92, and that the Parliament of Canada has no authority to legislate upon the subject except with the concurrence of the provincial legislatures. That being so, it follows that the legislature of Alberta has the right to so legislate, unless sub-sec. 3 of sec. 16 withholds such legislative authority. Now, it will be observed that the question of legislative authority upon such subjects is not referred to in sub-sec. 3 at all. If it had been intended by that subsection to vary the provisions of sec. 92 of the B. N. A. Act, and to withhold such legislative authority from the province and give it to the Dominion, it seems to me that Parliament would, in so grave a matter, have said so in express words. It has not done so. It is true that a certain power is given to the Governor in council, but it is far from being a general legislative power. The power to legislate for Saskatchewan and Alberta upon the subjects in question must be held to have resided somewhere immediately after 1st September, 1905. There must immediately after that date have been some legislative authority capable of dealing with the right to practise medicine in the two provinces. If it was not given to the provinces by sec. 3 of the Act, where is there anything to be found in sub-sec. 3 of sec. 16 to reserve it to the Dominion? I can find nothing whatever. It will be observed that the sub-section does not say that all laws and ordinances by which such societies are incorporated "shall continue" subject to being repealed by order in council. Had such words been used, they would, no doubt,

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have indicated a clear intention to exclude at least temporarily the legislative authority of the province upon those subjects. But such words are not used, and, to my mind, it is extremely significant that they are not used. There was plainly a reason for not directly confirming and continuing the legislation contained in the Ordinances incorporating the societies and associations referred to. In the first place, as long as any other reasonable and just interpretation can be placed upon its words, I do not think we should impute an intention to the Dominion Parliament to grant legislative powers to the new provinces by instalments. Moreover, even if we might presume a benevolent intention on the part of the federal executive to rescind the old Ordinances when the two provinces should both have legislated properly, or when the old societies asked to be dissolved, I do not think we should impute an intention on the part of Parliament, with respect to the very wide field for legislation covered by the subjects in question, to subject the new provinces which it was creating and admitting into the Confederation, presumably on equal terms, either to the discretion of the federal executive or to the mercy of each other. We might just as correctly, and I think in considering the questions before us that we are bound to, contemplate the possibility of an intention other than benevolent, because it is just possible that under the Territorial Ordinances professional men from the 7 other provinces might secure the right to practise in the two new ones on much easier terms than under any new provincial lgislation. The simple, bare situation is that if the appellant's contention as to the interpretation of sub-sec. 3 is correct, the right of the provinces to legislate might be delayed for years, might indeed be for ever withheld, and there would be no remedy outside of an appeal to the Imperial Parliament, because under the provisions of the B. N. A. Act, 1871, the Dominion Parliament has no power to amend the Alberta Act. It is, therefore, clear that if sub-sec. 3 confirms and continues in force all territorial Ordinances respecting professional associations, without providing, as it does not, that they may be amended or repealed by competent authority, then neither the provincial legislatures nor the Dominion Parliament can amend them, for if they did so, it would amount to an amendment of the Alberta Act, which is forbidden. Outside of Imperial legislation, therefore, the power of the federal executive would be absolute and uncontrolled. I do

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not, for my part, believe that any such situation was ever intended. The words of the sub-section by no means necessarily bear that meaning, but are capable of a much more consistent and logical interpretation. To my mind, the absence of any reference in the sub-section to the Ordinances themselves by which the societies were created, and of any reference to the repeal of them, the fact that merely the societies and associations are declared to continue, subject to being abolished by order in council, as well as the reference at the end of the sub-section to the disposition and division of their property, all clearly indicate an intention not to restrict the right of the provinces to legislate, but merely to preserve the existence of these societies as corporate bodies for the purpose of dividing their property between such provincial corporations a right be established by provincial legislation. This interpretation is, to my mind, simple and clear. It involves no restriction on provincial legislative power, and no granting of provincial status by instalment. It is the interpretation which I think should be adopted, and there is therefore, in my opinion, nothing in sub-sec. 3 which renders the Alberta Medical Profession Act ultra vires.

But it is said that, quite aside from sub-sec. 3, and even if it had not been in the Act at all, the provinces of Alberta and Saskatchewan have not the power to pass such an Act as that in question. The authority chiefly relied upon by the appellant to sustain this contention is Dobie v. Temporalities Board, 7 App. Cas. 136. But a careful consideration of that case and of the legislation with which it dealt will, I think, shew that the case is not a parallel one at all.

The temporalities board was a corporation established by the statute of the old province of Canada prior to confederation, as a trustee to hold and manage certain funds which had originated from the sale of the clergy reserves, and to which the clergy of a certain Presbyterian denomination were entitled under the legislation under which the reserves had been sold. The statute creating the board provided the manner in which the future members of the board were to be elected, and the manner in which the funds under its control were to be disposed of. Some members of the board, as well as some of the clergy entitled to the funds, resided in Lower Canada, and some of them resided in Upper Canada. When the union of the Presbyterian churches was contemplated in 1875, the legislature of Quebec passed the

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Act whose validity was in question. That Act assumed to directly amend the statute of old Canada by providing a new method of electing the board, and a new method of disposing of the property under its charge. It was held by the Privy Council that the legislature of Quebec had no power to do this. They held that there was no sub-section of sec. 92 of the B. N. A. Act, 1867, under which such legislation fell, and that therefore the right to legislate upon the subject involved fell to the Dominion by sec. 91. More particularly they declared that the subject dealt with did not fall within the category of property and civil rights in the province mentioned in sub-sec. 13 of sec. 92. It will be observed, however, that the lands from which the funds in question were derived had existed in both Upper and Lower Canada, that the clergymen entitled to a share of them resided in connection with their vocation in both portions of the old province, that the board was composed of persons residing in both parts of the province, and that it was with the disposition of the funds and the manner of electing this board that the Act in question attempted to deal. Nothing of the kind is attempted by the Alberta Medical Profession Act. No attempt is made to deal with the funds of the College of Physicians and Surgeons of the North-West Territories, or to alter the method by which the council of that college is to be elected. Lord Watson, in his judgment in the Dobie case, said: "The Quebec Act 38 Vict. ch. 64 does not propose to repeal and amend the Act of 1858 only in so far as its provisions may apply to or be operative within the province of Quebec, and its enactments are apparently not formed with a view to any such limitation. . . . The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two provinces of Quebec and Ontario cannot be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But, in the present case, the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual incorporators in that province. In addition to that, the fund to be administered by the corporate board under the Act of 1858 is held in perpetuity for the benefit of the ministers and members of a church having its local situation

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in both provinces, and the proportion of its revenue falling to either province is uncertain and fluctuating, so that it would be impossible for the legislature of Quebec to appropriate a definite share of the corporate funds to their own province without touching on the rights of the corporation in Ontario."

From these words, and from many other similar expressions in the judgment, it is quite evident that it was owing to the attempt of the Quebec legislature to alter the constitution and status of the board, and to deal with the funds under its control, that the Act was held ultra vires. In fact, it will be observed that in order to clinch every reason given for declaring the Act ultra vires, Lord Watson ends every paragraph with a reference to the alteration attempted to be made in the disposition of the funds of the board. In my opinion, to adapt the words of Lord Watson, the Alberta Medical Profession Act does not propose to repeal or amend the Ordinance of 1898, except in so far as its provisions may apply to, or be operative within, the province of Alberta, and its enactments are quite apparently framed with such a limitation. I also think, again to adapt the words of Lord Watson, that the Ordinance of 1898 can be validly repealed as far as it affects the province of Alberta by the Alberta Medical Act, because the result of such repeal is to leave the Ordinance in full vigour within the province of Saskatchewan. Neither the constitution of the College of Physicians and Surgeons of the North-West Territories, nor the manner of electing its council or governing board, nor the funds belonging to it, are attacked or altered in the slightest particular; and there is not a word in the Act now impugned to weaken in the least degree the operation of the Ordinance of 1898 within the province of Saskatchewan. As I have already indicated, it appears to me that the authority to legislate respecting the right to practise the profession of medicine within Alberta is given to the province by sub-sec. 13 of sec. 92 of the B. N. A. Act, as applied to the province by sec. 3 of the federal Alberta Act. The Alberta legislature, by the Act in question, assumed to pass legislation by which the right to so practise is to be regulated. It is true a new association with a new council is established, but it is only established for Alberta and not for Saskatchewan, as would be necessary if the Dobie case were parallel, and the old one is left with the

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exercise of all its rights within the province of Saskatchewan.

Now if we consider first the rights of individual members of the College of Physicians and Surgeons, who, prior to 9th May, 1906—the date of the passing of the Alberta Medical Profession Act—had the right to practise medicine within Alberta, it will be observed that by sec. 3 of the Act in question all such persons must automatically be registered as members of the Alberta college without fee and without even an application. It is true they cannot be so registered unless their fees due to the old college are paid in full, and it might be argued that because the non-payment of fees was no cause under the old Ordinance for forfeiture of the right to practise, therefore a right already acquired has been interfered with, but these fees were made a debt due to the old college and could be collected by action, and I therefore do not see any ground for complaint because they were already in any case legally bound to pay these fees. They are simply required to do what the law previously existing said they were bound to do.

But, even if there were some reason to complain on this score, I cannot see how such a consideration would make the Act ultra vires. It will be conceded, I think, that if the Territories had been created a single province, no one at least residing within it could attack the constitutionality of any new provincial Act which might have been passed imposing additional restrictions on the right to practise medicine; and for the same reason it will, I think, be also conceded that no practitioner residing in Alberta on 9th May, 1906, can have any reason to complain of the present Act. It will be said, however, that those practitioners who reside in Saskatchewan have had their rights infringed. But it is to my mind a somewhat startling proposition to say that a provincial Act regulating the right to practise medicine within the province, which would be otherwise valid, is ultra vires because the Act affects, or, for that matter, even destroys, the right of certain persons who happen to reside at present beyond the boundaries of the province, to practise medicine within the province. There are, I apprehend, a large number of lawyers in these two provinces who have at present the right to practise law in Ontario. If the Ontario

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legislature were to enact a law imposing severer restrictions upon that right, and making it more difficult for the lawyers referred to to maintain their Ontario privileges, can it be said that therefore the Ontario statute would be invalid? It is true there was on 9th May, 1906, a certain definite class of persons residing in the province of Saskatchewan who had the right to practise medicine in Alberta, and whose rights might, owing to the slight question of annual fees, be affected by the Alberta Medical Act; but, as I have said, that would have been the condition if the Territories had been made one province, and a single new Medical Act had been passed by its legislature in similar terms. The appellant, moreover, in this case, did not acquire any rights under the old Ordinance until after 9th May; and it appears to me still more absurd to say that not merely present existing rights must be protected, but that rights hereafter to be acquired must not be forestalled. In this connection we may refer to another statute passed by the Alberta legislature at its first session, viz., the Steam Boiler Act. By that Act no one is to be allowed to act as an engineer in operating a steam boiler unless he has a certificate under that Act. A similar Act has been passed in Saskatchewan. There had been a Territorial Ordinance dealing with the same subject and providing for similar certificates. Surely we are not to be told that the legislatures of Alberta and Saskatchewan cannot at any time hereafter alter the qualifications required of a stationary engineer, without saving the rights of all those persons who were fortunate enough to secure a territorial certificate. If one were to venture into more dangerous fields, one might also suggest that all school teachers who held certificates on 1st September, 1905, could not be deprived of their rights by separate provincial legislation, but that the Dominion Parliament must legislate upon that subject, all because their certificates gave them the right to teach in both provinces; this opens up a prospect from which most of us would shrink with some dismay.

Then with regard to corporate rights, it is true that there exists the corporation known as the College of Physicians and Surgeons of the North-West Territories, which, under its Ordinance, has the power to register practitioners, who, when registered, are to be deemed licensed to practise medicine. But this power of the college, exercised through its council, is by no means of the nature of a private right,

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much less a property right, such as was enjoyed by the temporalities board. It is, in my opinion, a part of the power of the state delegated to the college for the benefit of the public and in the general public interest. By removing that power within the boundaries of Alberta, no private right or property right of the corporation is interfered with whatever. The college itself is not destroyed nor is its constitution amended in the slightest, but it is left with full power and authority to continue its registration of practitioners; and, outside the boundaries of Alberta, that is, in the province of Saskatchewan, those powers may still be exercised in full vigour, and those practitioners may still exercise the right to practise medicine with full freedom until the legislature of Saskatchewan otherwise enacts. Then and then only the college will become an empty shell, but it will still be a corporate body, and may still own and deal with and divide its assets as it pleases, which is exactly what, in my opinion, was contemplated by sub-sec. 3 of sec. 16 of the Alberta and Saskatchewan Acts.

It seems to me, finally, that the appellant is placed in this dilemma with regard to the case relied upon. Sub-section 3 of sec. 16 must be considered, and we must put either the wider or the narrower interpretation upon it. If it bears the wider interpretation, then, as I have said, the professional Ordinances are confirmed by the constitution given to Alberta, and can only be repealed by Imperial Act or by action of the federal executive. The Dobie case would therefore be inapplicable. If we place the narrower construction upon it, then the inference must be that, aside from the bare existence of the corporation and its corporate funds, the provinces were intended to legislate. In this case, also, the Dobie case would be inapplicable.

I am, therefore, of the opinion that the Act is within the powers of the Alberta legislature, and that the conviction was right and should be affirmed.

Conviction quashed; STUART, J., dissenting.

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NORTH-WEST PROVINCES.

(EDMONTON.)

HARVEY, J. JANUARY 28TH, 1907.

CHAMBERS.

RE SANDISON.

Will — Construction — Bequests to Children — Death of Children—Devolution of Shares—Vested or Contingent Interests—Income—Maintenance

Summary application by the widow of Charles Sandison for an order declaring the construction of his will and declaring that the interests which the children took under the will were vested, and that she was entitled to an interest as next of kin of the deceased children.

J. E. Wallbridge, for applicant.

H. H. Parlee, for trustees.

N. D. Beck, K.C., for infants.

HARVEY, J.:—The testator by his will provided as follows:—"I give all my property both real and personal unto my said trustees in trust, to convert the same into money whenever and at such times as my said trustees shall think proper, and to invest the proceeds in any manner they may deem best, with power to vary such investments at their discretion; and to pay the income from such investments or any income arising out of my estate to my children for their proper maintenance and education, or to such as are under age. Should the said income not be sufficient, then my said trustees are to use such portions of my estate as they deem best for such support and education. Should there be any surplus from the income of my said estate, my said trustees are to invest the same as they deem best. I desire my trustees to divide all my estate share and share alike among my children, and to pay to each of my sons on attaining the said age of 21 years, or my daughters on attaining the said age of 21 years or marrying, his or her share. Provided that such share or shares can be paid

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without in any way being injurious to the rest of my estate, and in arriving at the proportion due to each child, I wish my trustees to take into consideration the amount that would be necessary to maintain and educate any child or children that may be under age at the time of making the payment of any share to any child or children. Should none of my children survive me, I direct my said trustees to give all my estate at such time or times and in any manner they may deem best to such educational or charitable institutions in Edmonton as they may select."

The testator died, leaving him surviving 5 infant children, 2 of whom have since died, the eldest of the 3 remaining being of about the age of 6 years.

The widow now applies for a construction of the will and a declaration that the interests which the children took under the will were vested, and that she is entitled to an interest as next of kin of the deceased children.

It will be observed that no direct gift is made to the children, the direction simply being: "I desire my trustees to divide all my estate share and share alike among my children and to pay," etc. It was urged by counsel for the widow that "to divide and to pay" had a different meaning from the expression "to divide and pay," but I find myself unable to make any distinction.

"The rule regarding the vesting of interests in a case such as this, as laid down by Theobald, 6th ed., p. 563, is that "when the only gift is to be found in the direction to pay or divide, where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time." There is, however, a recognized exception to this rule, that if the interest upon a legacy is given to the legatee in the meantime till the time of payment arrives the gift is vested. This exception, however, is subject to certain limitations, and one of the limitations appears to me to be applicable to the present case. The principle is stated by Theobald, p. 566, as follows: "A distinction must be drawn between the gift of a sum to each member of a class at 21 with a gift of the interest upon the several shares in the meantime, and the gift of an aggregate fund to a class as they respectively attain 21 with a direction that the whole interest is to be applied for their maintenance in the meantime; in the latter case, as the fund is to be kept together and the whole interest applied for maintenance, nothing will vest

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before 21." The same distinction is pointed out in Williams on Executors, 10th ed., p. 981 et seq. In In re Parker, 16 Ch. D. 44, Jessel, M.R., said: "It appears to me that this case is different from that of Fox v. Fox. In my opinion, when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given, and not the less so when there is superadded a direction that the trustees shall pay the whole or such part of the interest as they shall think fit, but I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held a vested interest in the member of the class who does not attain that age." This principle has been followed in later cases, the latest to which my attention has been called being Re Gossling, [1902] 1 Ch. 945. This last mentioned case was reversed on appeal, but not on the ground of dissent from the principle, but on the ground that the principle did not apply, and that the beneficiaries were entitled to definite shares of the interest.

It seems to me beyond question that under the terms of the present will each child is not entitled to any particular portion of the income, but only to so much of the income as may be necessary for its education and maintenance.

There are further reasons for coming to the conclusion that the interests were not intended to be vested under this will, for instance, the provision that a portion of the corpus may be taken for education and maintenance if the trustees consider it necessary; but it appears to be so clearly covered by the principle I have mentioned above that it is not necessary to consider any further provision, and I am, therefore, of the opinion that the children did not take vested interests upon the death of the testator, and that the widow is not entitled to anything by reason of the death of the two children.

As the matter, however, was one upon which the trustees would have been justified in coming to the Court for direction if this application had not been made by the widow, I am of opinion that it is only fair that the costs of this application should be paid out of the estate.

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NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 15TH, 1907.

TRIAL.

GIBSON v. WICKHAM.

Negligence — Fire from Threshing Engine — Destruction of Grain — Leaving Spark Arresters Open — Contributory Negligence—Acquiescence—Damages.

Action for damages for destruction of plaintiff's wheat by fire owing, as alleged, to the negligence of defendants.

E. L. Elwood, Moosomin, for plaintiff.

J. T. Brown, Moosomin, for defendants.

WETMORE, J.:—The plaintiff is a farmer. The defendants operate a threshing machine. The plaintiff employed the defendants to thresh his grain. While the threshing was in operation, 4 stacks of the plaintiff's wheat were burned. The plaintiff alleges that this damage was occasioned through the negligence of the defendants, and by their failure to observe the provisions of the Prairie Fire Ordinance. The motive power of the threshing outfit was, as usual, a steam engine. While the engine was in operation, working the separator, the fire in question occurred. Counsel for the defendants conceded at the trial that the fire could only have taken place either from a spark from the engine or from a match which had dropped from a pocket of one of the defendants' men, and which in some way got ignited.

It is not necessary for me to state the process of reasoning by which I arrive at the conclusions of fact that I have come to; it is sufficient for me to state the conclusions. I find the following facts. The fire started on the dome, or roof, of the stack, between the top and the eave. It was occasioned by a spark from the defendants' engine. Neither of the spark arresters on that engine were closed at the time, and it was by reason of such spark arresters not being closed that the spark was carried to the stack and

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set fire to it. If these spark arresters had been closed, in view of the character of the day and the distance the engine was from the stack in which the fire occurred, no spark could have got out which could have been carried alive to the stack and set fire to it. I find, therefore, that the defendants were guilty of negligence in this respect, and I find this entirely apart from the provisions of the Prairie Fire Ordinance.

It is the duty of persons operating a machine of this character, where fire is used, to provide such appliances as are usually used for the purpose to prevent the escaping of fire, and, in so doing, minimize the danger of accident, and when they do provide such appliances it is their duty to use them, and, not only that, but to see that they are in proper order at all times; at any rate, in so far as they can do so.

It is not necessary for me to elaborate any question of law in this case, because it is clear that under such findings the defendants are liable for damages.

It was contended, however, that the plaintiff was guilty of contributory negligence. The only contributory negligence alleged is that it was a windy day, and the plaintiff pointed out the place where the engine was to be placed in threshing the stacks which were burned, and that he was aware of the fact that the engine had been previously working with one of the spark arresters—namely, the one on the top of the smoke stack—open. In the first place, it is questionable whether the plaintiff did locate the place for placing the engine as alleged, and, if he did, for the reasons already stated, notwithstanding the wind, the accident would not have occurred if the spark arresters had not been open; and therefore the question whether he indicated the place for the engine to work or not is not material. As to his knowledge with respect to the engine previously working with the spark arrester open, there is no evidence that he was aware on the morning of the fire and before it occurred that this spark arrester was open. I may add that I have very great doubts whether what is so alleged as contributory negligence amounts to contributory negligence. It is not necessary for me to decide that, because in Radley v. London and North Western R. W. Co., 1 App. Cas. 754, it is laid down at p. 759 as follows: "Though the plaintiff may have been guilty of negligence, and although that

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negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." Here, notwithstanding the fact that the plaintiff might have placed the engine or might have been aware that it was not being properly run in the respect mentioned, the defendants might by the exercise of ordinary care and diligence, namely, keeping their spark arresters closed, have avoided the accident.

It was also urged that the plaintiff by so indicating a place for the engine to be worked and by his knowledge of the manner in which it was worked, and not objecting to it, acquiesced in the defendants working the engine in the way they did. I think this is merely another way of setting up the question of contributory negligence. I never heard of acquiescence as ordinarily understood being applied to an action of this kind. Acquiescence generally arises by way of estoppel, as, for instance, when a person stands by and allows another to expend money on his property, or allows a person to purchase property to which he has a claim, without entering any protest or objection: as in Gray v. McLennan, 3 Man. L. R. 337, cited by counsel for the defendants. The question there was whether a building erected on demised lands was part of the freehold or not. The tenant gave a chattel mortgage on the building, and it was about to be sold at public auction. The landlord went to the place of sale, where he was informed that the wife of the tenant was going to buy the building in, and, being satisfied with this, he went away before the sale. He made no objections to it and took no steps to warn bidders of any claim that the building had become part of the freehold and had passed to him as such, but, on the contrary, he gave the bailiff conducting the sale a distress warrant, under which he was to be paid a portion of the proceeds of the sale. The Court held that as against a purchaser ignorant of the landlord's right the landlord was estopped from claiming the building as a part of the freehold. It is not necessary to cite other cases of acquiescence. This case gives a general idea of what I conceive is meant by the expression.

There must be judgment for the plaintiff.

The question of damages now arises. Of course, the quantity of the wheat in the stacks that were burned (there

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were 4 of them) must be largely a matter of estimation. The evidence, as usual, is conflicting on the question. I think, however, that, inasmuch as it has been by the fault of the defendants that the plaintiff has been put in the position that he cannot accurately arrive at the quantity of wheat, I ought to make a liberal allowance. I will take the estimate of the defendant William Wickham (400 bushels). I think that is a liberal one. The grading of the wheat is another difficult matter. I will therefore assume one half of it to be No. 1 Northern and the other half No. 2 Northern. The price of No. 1 Northern at the time was 61 cents a bushel; deducting from that 10 cents expense of threshing and hauling to market, leaves 51 cents, at which 200 bushels would make $102. The price for No. 2 Northern was 56 cents, and deducting 10 cents a bushel for hauling and threshing, leaves 46 cents, and 200 bushels of this at 46 cents would be $92. That will make altogether $194. I will not deduct anything from the price for the expense of boarding the men.

There will be judgment for the plaintiff therefore for $194 and costs.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 15TH, 1907.

CHAMBERS.

CLARKE v. FAWCETT.

Pleading—Reply Delivered after Time Expired—Motion to Set aside—Practice.

Application by defendant to strike out plaintiff's reply, on the ground that it was delivered more than 8 days after the delivery of defendant's defence and counterclaim, and without an order having been made extending the time for delivery.

J. T. Brown, Moosomin, for defendant.

E. A. C. McLorg, Moosomin, for plaintiff.

WETMORE, J.:—In Graves v. Terry, 9 Q. B. D. 170, the defendant moved the Court for judgment upon admissions

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of facts in the pleadings. This application was made before the Rules now in force in England came into operation. The Rules then in force provided that the plaintiff should deliver his reply within 3 weeks after delivery of the defence, and then it was provided by another Rule that, if the plaintiff did not deliver a reply within the period allowed, the pleadings should be deemed to be closed at the expiration of that period, and the statement of facts in the pleading last delivered should be deemed to be admitted. The Court held that the reply was a perfectly good one. Field, J., in delivering judgment says as follows: "But the reply, though delivered after time, is a perfectly good one unless the Act says it shall not be so. No doubt, the Act does clearly say that, so long as no reply is delivered after the time has elapsed, the pleadings may be taken to be closed, and in strictness the defendant is entitled to judgment. But the question would then be whether the plaintiff deliberately intended not to reply." Then he goes on further: "No case has gone so far as to decide that where, as here, reply has been actually delivered, judgment can be signed against the plaintiff;" and the motion was refused. A very important alteration was made by subsequent Rules of practice in England, and by the Rules in the Judicature Ordinance. Rule 153 provides that "a plaintiff shall deliver his reply, if any, within 8 days after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or Judge." Then Rule 156 provides that "if the plaintiff does not deliver a reply or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." These Rules were taken from the English Rules in force at the time of the enactment of the Judicature Ordinance. These Rules make the consequence of not delivering a reply to a defence just the opposite of what it was made by the Rules under which Graves v. Terry was decided, but they do not alter the principles upon which the Court laid down the practice in Graves v. Terry as they did, that the reply was a good one though delivered after time, inasmuch as the Act did not say that it should not be so. The Ordinance in this case does not state that the reply shall be bad or invalid if delivered after 8 days. I refer

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also to Wright v. Wright, 13 P. R. 268. The Ontario practice provided that if a plaintiff did not deliver his reply within 3 weeks after the defence or the last of the defences should have been delivered, the pleadings should be closed. Rose, J., held that a pleading delivered after the time could not be set aside, unless at any rate notice of trial had been given or some other step taken upon the closed pleadings, as he describes them. I cannot escape the authority of these two cases, and I must hold that the application must fail. No step was taken in this case before the reply was delivered.

Application dismissed with costs.

YUKON TERRITORY.

MACAULAY, J. JANUARY 25TH, 1907.

CHAMBERS.

McDONALD v. SCEARCE.

Chattel Mortgage—Sale under—Injunction against by Second Mortgagee—Payment—Appropriation of Payments.

Application by plaintiff to continue an injunction restraining the defendant Scearce from selling the goods of the defendant Butler referred to in a certain chattel mortgage dated 29th August, 1905, which sale was advertised to take place on 18th January, 1907, until the hearing and trial of this cause.

C. W. C. Tabor, for plaintiff.

J. B. Pattullo, for defendant Scearce.

No one appeared for defendant Butler.

MACAULAY, J.:—It appears that on 29th August, 1905, defendant Butler, by indenture of chattel mortgage, mortgaged to defendant Scearce the goods and chattels set out in the mortgage, which mortgage provided that all goods and chattels which might thereafter be taken or brought into stock or possession of the mortgagor, during the cur-

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rency of the mortgage or any renewal thereof, should at once become thereby mortgaged without any fresh instrument being executed for that purpose, to secure to the defendant Scearce an amount for future advances not to exceed $4,000.

On 28th August, 1905, defendant Butler mortgaged to plaintiff the same goods and chattels to secure the sum of $6,650, but, by agreement between the parties, the mortgage to the defendant Scearce was to be considered a first mortgage to the extent of the said $4,000.

By the terms of the mortgage from the defendant Butler to the defendant Scearce the period of credit allowed to Butler was not to extend beyond 1st May, 1906.

The evidence shews that, on the admission of defendant Butler, defendant Scearce on the date of the mortgage demanded from defendant Butler payment to him of all moneys received by defendant Butler from his business as a merchant from the sale of the mortgaged goods, and that defendant Butler has paid to defendant Scearce, on each and every night from the date of the mortgage up to 5th January, 1907, all moneys so received by him in his business, on each and every day during the said period, and that Scearce has received the same, and that such payments so made by defendant Butler to defendant Scearce would average an amount of $4,000 per month since such date. Scearce stated that he had appropriated all such moneys to payment of unsecured indebtedness of defendant Butler to himself, and that no appropriation had been made by him of these moneys to payment of the mortgage moneys, and, on cross-examination of Mr. M. B. O'Dell on his affidavit filed on this application by counsel for the defendant Scearce, he stated that defendant Butler admitted to him that he had paid over the moneys each night without any special instructions; that defendant Butler kept no books of account other than a customers' ledger, and was unable to give an account of any moneys received by him or paid out by him, as he had, as before stated, daily paid all the moneys received from sale of the mortgaged goods in his business as a merchant to defendant Scearce; that defendant Scearce has refused to give an account of the moneys received by him, and that defendant Butler admitted that he is possessed of no means whatever and is absolutely unable to pay

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any portion of the mortgage moneys due to plaintiff other than by the sale of the mortgaged goods and chattels now in the possession of defendant Scearce and advertised by him to be sold on 18th January, 1907. No material whatever was filed or used on behalf of defendants or either of them.

In Johnson v. Bourne, 2 Y. & C. 267, where a mortgage was taken to secure future advances, not to exceed £5,800, and the mortgagor built three separate dwellings upon the mortgaged premises, and, on the sale of such dwellings, the moneys procured from such sales were paid by the purchasers to the mortgagee, and not to the mortgagor, it was held that the moneys must be applied by the mortgagee on the mortgage debt and not on a general account between the mortgagor and mortgagee.

In Young v. English, 7 Beav. 10, it was held that where a mortgagor had a general account with the mortgagee, as well as a mortgage account, and moneys were paid by him without any special appropriation being made by the mortgagor, the payments so made must be considered as made on the mortgage account, and the mortgagee had no right to apply it to the general account.

In Hickson v. Darlow, 23 Ch. D. 690, it was held that the general rule that a sale by a mortgagee will be restrained only on payment into Court by the mortgagor of the amount which the mortgagee swears to be due to him, does not apply where the Court can see in the terms of the deed that this amount cannot be due on the security.

Hills v. Moore, 15 Beav. 175, and Codrington v. Parkey, 16 Ves. 469, are to the same effect.

In Macleod v. Jones, 24 Ch. D. 289, it was also held that the ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee, at the time of taking the mortgage, was the solicitor of the mortgagor.

Kerr on Injunctions, at p. 526, is to the same effect.

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It was argued by counsel for defendant Scearce that, as plaintiff had pleaded that if the sale is permitted to proceed, he, plaintiff, will suffer irreparable loss and damage, the expression cannot be taken to mean a pecuniary damage, and consequently, having so pleaded, that the sale should not be restrained, as the effect of the sale could only inflict upon him a pecuniary injury.

In the case before me the second mortgagee is in the position of a mortgagor in a redemption suit, and he can only obtain an injunction restraining the first mortgagee from exercising his power of sale on the terms of payment into Court of the amount due on the mortgage for principal, interest, and costs, unless the circumstances of the case are such that the ordinary rule should not apply.

In this case, on the evidence before me, from the date of the mortgage (29th August, 1905), until 7th January, 1907, defendant Butler paid to defendant Scearce all the moneys he received daily from the sales of the mortgaged goods, averaging about $4,000 per month, without any special appropriation being made of such payments, and the amounts so paid would be more than sufficient to satisfy the mortgage debt.

The cases of Johnson v. Bourne and Young v. English both hold that where payments are so made the mortgagee must apply them upon the mortgage debt and not upon a general account.

No evidence was given before me whatever to shew that defendant Butler was indebted to defendant Scearce in any amount, except the admissions before mentioned. The evidence shews that defendant Scearce has refused to give an account of the moneys received by him or the moneys due to him.

Under all the circumstances, I am clearly of the opinion that this case should not fall within the ordinary rule, where the mortgagor or subsequent mortgagee must pay into Court the amount due under the mortgage, or sworn to be due, before obtaining the relief asked. I think plaintiff is clearly entitled to an order restraining defendant Scearce from proceeding with the sale of the said goods until the hearing and trial of this cause.

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Should the parties agree that a sale of the goods take place before the hearing or trial of this cause, the proceeds of such sale should then be paid into Court, and in the event of such a sale taking place by consent of parties, I am of opinion that the first mortgagee should be permitted to bid for the goods at the sale in the same manner as any other person should be allowed to so bid.

The costs of this application shall be costs in the cause.

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MACDONALD, J. FEBRUARY 26TH, 1907.

TRIAL.

SMITH v. AMERICAN ABELL ENGINE AND THRESHER CO.

Real Property Act—Caveat—Charge on Land—Validity—Lien Notes Act—Construction of sec. 4.

Action to set aside a caveat filed by defendants.

Prior to the month of April, 1906, one Harvey Fox was the owner of an estate in fee simple in the north-east quarter of section 32, township 3, west of the principal meridian, in the province of Manitoba, and a certificate of title under the Real Property Act had issued to him, subject to certain incumbrances, memorials of which were entered upon the certificate. Harvey Fox, by instrument of transfer under the Act, duly transferred the said land to Alfred J. Long, and a certificate of title was on 5th April, 1906, issued to Long, subject to the said incumbrances. Long executed a transfer of the land to plaintiff, and the transfer was duly registered and a certificate of title was issued to plaintiff, subject to incumbrances.

It was agreed between the parties that the position of the parties to this action was to be considered, without taking into consideration the transfer from Harvey Fox to Alfred J. Long, but rather as if the transfer from Harvey Fox was given direct to plaintiff.

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Defendants on 29th August, 1902, sold to Harvey Fox a 25 horse power engine and other machinery, the whole constituting what was called a threshing outfit, and on the same day secured from Harvey Fox an instrument under his hand and seal by which he charged and created a lien upon the land referred to in favour of defendants for $3,700, with interest as therein mentioned, which instrument was filed in the action as exhibit 1, and on 17th September, 1902, defendants caused this instrument to be filed by way of caveat in the land titles office at Winnipeg, being the land titles district in which the lands were situated.

The plaintiff brought this action to have it declared that the caveat and the registration of the filing thereof were absolutely null and void, and to have the same vacated and set aside, and to have it declared that defendants had no claim upon or interest in the land as against the plaintiff, on the ground that the caveat was founded upon an instrument or document made between Harvey Fox and defendants, which was a lien note, hire receipt, order for chattels, or a document or instrument containing as a portion thereof, or having annexed thereto or indorsed thereon, an order, contract, or agreement for the purchase by Harvey Fox from defendants or delivery by defendants to Harvey Fox of a chattel or chattels, and the caveat was such that the registration thereof was prohibited under the Lien Notes Act, R. S. M. 1902 ch. 99, and that the filing thereof was absolutely null and void.

C. P. Fullerton and H. Price Blackwood, for plaintiff.

A. B. Hudson, for defendants.

MACDONALD, J.:—The plaintiff's action must succeed or fail upon the application of the Lien Notes Act to the transaction in question between Harvey Fox and defendants.

Section 4 of the Lien Notes Act provides that on and after 11th March, 1893, no lien notes, hire receipts, orders for chattels, or documents or instruments containing as a portion thereof, or having annexed thereto, or indorsed thereon, any order, contract, or agreement for the purchase or delivery of any chattel or chattels, could lawfully be and none of the same shall hereafter be registered in any registry office or land titles office, and no caveat shall be registered or filed which has annexed thereto or indorsed thereon or which refers

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to or is founded upon any instrument or document or part thereof, the registration of which is prohibited by this section; and it is contended by plaintiff that the caveat and the instrument annexed thereto, the subject of this action, comes within the provisions of this section.

The caveat referred to has not annexed thereto or indorsed thereon any order, contract, or agreement for the purchase or delivery of any chattel or chattels, nor is there any reference that it is given in connection with any such purchase.

The instrument annexed to the caveat was given as security for the purchase price of the threshing outfit referred to and described in the order, exhibit 2, and it is contended on behalf of plaintiff that the two instruments, exhibits 1 and 2, must be read together, and that the instrument creating the lien (exhibit 1) is of the same effect as if embodied in the order for the machinery (exhibit 2.) I cannot see the force of this contention; if sec. 4 was so interpreted, it would mean that the vendor of chattels could not take any security the subject of registration for the purchase price.

I interpret sec. 4 to mean that the security cannot be embodied in the order for the chattels, but there is nothing in the Act to prohibit security being taken separate and apart from the order under which the chattels are purchased.

It is said by counsel for the plaintiff that this is a subterfuge, an evasion of the statute.

The case of Madell v. Thomas Co., [1891] 1 Q. B. 230, cited by counsel for plaintiff, has, in my opinion, no bearing on this case that can assist him. Lord Esher in his judgment says: "The Court ought not to let a sham document drawn up for the purpose of evading an Act of Parliament prevent it from getting at the truth of the matter." He further says: "I do not deny that people may evade an Act of Parliament, if they can, but if they attempt to do so by putting forward documents which appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth."

The instrument in question here (exhibit 1) is not a sham document; it is just what it purports and what it was intended to be.

I dismiss the action with costs.

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MANITOBA.

MACDONALD, J. FEBRUARY 26TH, 1907.

TRIAL.

BROWN v. THOMAS.

Chose in Action — Assignment — Validity — Agreement— Cheque—Attachment of Debts—Issue.

Issue to determine who was entitled to certain moneys in Court.

R. G. Affleck, for plaintiffs.

C. P. Fullerton, for defendants.

MACDONALD, J.:—Under the attaching order issued herein the garnishee paid into Court the sum of $513.80, and suggests to the Court that there is a claim to the money, adverse to that of the plaintiffs, by the Bank of Ottawa under an alleged assignment, of which notice was given to the above named garnishee before service of the attaching order.

The matter comes before me for disposal under Rule 768 of the King's Bench Act.

On or about 28th November, 1904, the defendants assigned to the Bank of Ottawa two sums of money of $150 and $550 respectively then due or accruing due from the above named garnishee to them, as security for an advance of $550 then made by the bank to the defendants. The moneys so assigned were not collected by the bank, as the advance made was repaid through other sources.

The defendants being indebted to the Winnipeg Paint and Glass Co., and the latter demanding payment, the defendants on 5th December, 1904, agreed to secure their claim by assigning their claim against the garnishee, which was then under assignment to the Bank of Ottawa, and, in order to carry this agreement into effect, the manager of the Winnipeg Paint and Glass Co. and William Thomas, the senior member of the firm of Thomas Bros., the defendants, called upon the manager of the Bank of Ottawa and advised him of this agreement, and William Thomas requested the manager of the bank to hold the assignment which was then held by

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the bank as security for the indebtedness of the defendants to the Winnipeg Paint and Glass Co., and, at the same time, the defendants gave a cheque for the sum of $550 upon the Bank of Ottawa in favour of the Winnipeg Paint and Glass Co., which cheque was on 26th January, 1905, deposited to the credit of the company. Subsequently the plaintiffs brought this action against the defendants, and attached the moneys due by the garnishee to the defendants and now in Court.

The issue to determine is, who is entitled to the moneys in Court. From the facts, as I find them as above, there was a valid assignment of the moneys in question to the Bank of Ottawa in the first instance, and, after the claim of the bank was satisfied by the subsequent arrangement, that assignment continued in effect for the security of the cheque for $550 issued by the defendants on the Bank of Ottawa and in favour of the Winnipeg Paint and Glass Co., and, the bank having paid that cheque, are entitled to the moneys the subject of the assignment held by the bank, and being the moneys now in Court, together with costs.

MANITOBA.

MACDONALD, J. FEBRUARY 26TH, 1907.

TRIAL.

CONDELL v. LIGHTFOOT.

Vendor and Purchaser — Contract for Sale of Land—Payment—Default—Rescission—Notice.

Action for specific performance of a contract.

S. G. McKay, for plaintiff.

J. F. Kilgour, for defendant.

MACDONALD, J.:—On 2nd June, 1905, the defendant entered into an agreement in writing with one William H. Davidson for the sale to the latter of lots 10 and 11 in block 23, a sub-division of the north-west quarter of section 14,

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township 10 and range 19 west of the principal meridian in the province of Manitoba, for the price or sum of $250, payable $50 cash at the execution and delivery of the agreement and the balance on 2nd December, 1905, with interest thereon at the rate of 7 per cent. per annum.

This agreement contains the following clause: "And it is further agreed that, in case the purchaser shall at any time make default in any of the payments by him herein agreed to be paid, or in part thereof, or in the performance of any covenant herein contained, the vendor shall be at liberty at any time after such default, with or without notice to the purchaser, either to cancel the contract and declare the same void and forfeit any payments that may have been made on account thereof and retain all improvements that may have been made on said premises, or to proceed to another sale of the said lands, either by public auction, tender, or private contract, and the deficiency, if any, occasioned by such re-sale, with all costs, charges, and expenses attending the same or occasioned by such default, shall be made good by the said purchaser, and the vendor shall be entitled, immediately upon any default as aforesaid, without giving any notice or making any demand, to consider and treat the purchaser as tenant holding over without permission or any colour of right, and may take immediate possession of the premises and remove the purchaser therefrom. And it is further agreed that time is to be considered the very essence of this agreement."

Davidson, by indorsement under seal on the agreement referred to, assigned and transferred to plaintiff all his right, title, and interest of, in, and to the agreement and every clause, article, or thing therein contained.

Plaintiff brings this action to enforce specific performance of the agreement.

The payment of $200 which fell due on 2nd December, 1905, was not made, and defendant on 18th January, 1906, addressed and signed a notice to W. H. Davidson, the purchaser under the agreement of sale referred to, in the following words: "Please take notice that at the expiration of 30 days after above date, unless balance due December 2nd, '05, on lots 10 and 11, block 23 N.-W. ¼ sec. 14 is paid, with interest to date, I shall consider our contract of June 2nd, '05, null and void, as per terms of agreement of sale."

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This notice was received by Davidson on 19th January, 1906, and the same day it was handed by Davidson to plaintiff.

On 19th February plaintiff called upon defendant and asked for an extension of time for payment, and offered his note, which was refused.

Nothing further was done until 2nd March, 1906, when plaintiff telephoned defendant that he was then prepared to pay the balance of purchase money, to which plaintiff replied that the deal was closed.

On 17th March, 1906, plaintiff tendered defendant payment of the balance of the purchase price, together with a transfer for execution, which defendant refused to accept or execute.

It is asserted by plaintiff that, at the time of the purchase by him from Davidson, he was advised that defendant had agreed to extend the time for payment of the balance of purchase money until June, 1906.

The evidence on this point convinces me that there was no such agreement, and, even if there was, the agreement being verbal and without consideration, defendant would not be bound by it and would be within his legal rights to withdraw from it. Plaintiff in the 3rd paragraph of his statement of claim alleges as a consideration for such an extension the payment of interest on the sum of $200, the unpaid balance of purchase price at the rate of 7 per cent. per annum, but, as the agreement of sale between the parties provided for such interest, this could not be a consideration for such an agreement to extend the time of payment.

I think the notice was properly and lawfully given, and that defendant acted in a reasonable manner and not capriciously, and the time given by the notice within which plaintiff was required to pay the balance due having expired, the agreement is at an end.

I dismiss the action with costs.

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MACDONALD, J. FEBRUARY 26TH, 1907.

TRIAL.

McLAREN v. McMILLAN.

Fraud and Misrepresentation—Promissory Notes—Action for Cancellation—Intoxication of Maker—Partnership—Purchase of Horse.

Action for a declaration that certain promissory notes were void for fraud, and to restrain defendants from negotiating them.

R. M. Noble and A. D. Card, for plaintiffs.

G. Barrett, for defendants.

MACDONALD, J.:—Defendants are horse-dealers carrying on business at the city of Brandon. On 22nd December, 1905, one John Fowler, who was the agent of defendants at the town of Carberry, approached plaintiff Robinson with the object of inducing him to purchase a share in a horse called "Silver Coin," and Robinson agreed to purchase one share for $300, and obtained from him his signature to two promissory notes for $1,500 each, being the full purchase price of the horse, on the express condition that his co-plaintiff John McLaren should also purchase a share or shares, and become part owner.

It was also a condition of the agreement for the purchase of the horse that the signatures of 10 good men were to be obtained to form a syndicate, the object, no doubt, being that each would be responsible and good for the amount individually subscribed.

Subsequently defendants, through their agent, induced plaintiff John McLaren to purchase a share and to sign the notes referred to, having previously obtained the signatures of plaintiff Robinson and also of E. and J. Humeston.

Plaintiff McLaren alleges that at the time of his signing the notes he was absolutely unable and in an unfit condition both physically and mentally to do any business, being completely under the influence of liquor or drugs, and that

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Fowler, defendants' agent, took advantage of this condition in obtaining his signatures.

Plaintiff had been drinking heavily through the day on the evening of which the notes were signed by him, but I do not think that he was in such a condition as to warrant me in holding that he had not an agreeing mind.

If the party is in such a state of intoxication as not to know what he is doing, and particularly when the fact is known to the other party, the contract is void altogether, and taking a contract under such circumstances constitutes fraud: Gore v. Gibson, 13 M. & W. 623.

No agreement if the defendant intoxicated has not an agreeing mind and is deprived of the exercise of reason, but not so if the intoxication only darkens reason: Pitt v. Smith, 3 Camp. 33.

A deed obtained from a man in such an extreme state of intoxication as to deprive him of his reason would be invalid even at law: Cook v. Clayworth, 18 Ves. 12.

Drunkenness is not a ground for setting aside a contract if it caused excitement only and did not rise to that degree which may be called excessive drunkenness: Vivian v. Scoble, 1 Man. L. R. 125.

So stupidly intoxicated that he could not give a collected or rational answer at the time of execution of the deed, would constitute a defence: Butler v. Mulvahill, 1 Bligh 137.

The above are cases cited by counsel for plaintiffs in support of their claim to be released from the burden of their contract by reason of the condition of plaintiff McLaren at the time of obtaining his signature. Plaintiff McLaren was not so intoxicated as not to know what he was doing; he was undoubtedly excited by reason of excessive drinking, and was more pliable and easily led into a business deal than he would be if perfectly sober.

Immediately before signing the notes he examined the horse and expressed satisfaction with him. Witnesses present at the time of examining the horse and signing the notes, which was on a Saturday night, state that McLaren appeared to be all right.

On Monday morning, when McLaren was sober, he repented of his action. He says he remembered having signed something and also remembered another transaction which he had had with one Gascoyne, and he came into Carberry

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with the object of withdrawing from the bargains he had made. The business between him and Gascoyne was satisfactorily arranged, but Fowler, defendants' agent, when asked by McLaren to release him, stated that he did not think he could, and suggested that the matter should stand in the meantime, and nothing was done for a time until McLaren consulted his solicitors, resulting in this action.

The action is brought to have it declared that the notes are fraudulent and void, and for an order of the Court that it or they may be delivered up to be cancelled, and an injunction restraining defendants from negotiating or otherwise dealing with them, and in the alternative, in case the note or notes have been negotiated, damages against defendants for the amount of the note or notes so negotiated.

If plaintiffs alone were the parties to the contract and the notes signed by them only, they would, if misrepresentation and fraud were established, and the notes had not been negotiated, be entitled to relief, and a rescission of the contract and a delivery and cancellation of the notes, but plaintiffs are not in a position alone to put an end to the contract, as in fact a partnership had been formed in the making of the contract, and all the members thereof are not asking for rescission: Morrison v. Earls, 5 O. R. 434.

The only remedy of plaintiffs, therefore, would be in damages by cross-action or counterclaim.

I am satisfied that when McLaren signed the notes he was of the impression he was signing for the value of one share only, and that his liability would not exceed that amount, and the conduct of Fowler, defendants' agent, amply justifies that conclusion. Fowler says that McLaren wanted to buy the horse and become the sole owner, but that he would not sell him, stating as a reason that the loss would be too great in the event of anything happening the horse, yet Fowler knows McLaren to be a man of substance capable of meeting his obligation for payment of the horse, but he takes care to get McLaren's signature to two notes amounting to $3,000, with a number (but not all) of men of straw becoming joint and several makers with him.

Whatever defence plaintiffs may have in the event of action being taken against them on the notes in question, or what damages they may sustain against defendants after maturity of the notes, they are not entitled to succeed in this action, and it must be dismissed with costs.

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MACDONALD, J. FEBRUARY 26TH, 1907.

TRIAL.

CASE THRESHING MACHINE CO. v. WERNIGER.

Promissory Note—Action on—Defence—Price of Goods Sold—Failure of Consideration — Defects in Goods—Contract — Privity.

Action on a promissory note given for the price of machinery.

H. E. Henderson and R. M. Matheson, for plaintiffs.

G. R. Coldwell, K.C., and R. A. Clement, for defendant.

MACDONALD, J.:—In 1901 the plaintiffs sold to one David Kirkpatrick a 20-horse power engine and separator and other machinery, the whole constituting what is known as a threshing outfit.

Kirkpatrick worked this outfit for 3 seasons with varying success; the first year the engine worked badly and experienced difficulty in keeping up steam. In 1902 there was an improvement, and in 1903 a payment was made on the purchase price, and security given by way of mortgage on Kirkpatrick's land for $2,800, the balance then due.

Kirkpatrick, finding difficulty in making payment of the balance due, and the company pressing for payment, made up his mind to dispose of the outfit, and, with that purpose in view, took it into the city of Brandon and left it with a machinist, one Arnett, for repairs, and while in the possession of the latter the defendant called and inquired who owned the outfit and if it was for sale. Arnett told him that Kirkpatrick owned it and that it was for sale. Shortly after this Arnett saw the defendant and Kirkpatrick going through his yard and examining the engine. Arnett states that the engine was in poor shape when brought to him for repairs, the boiler very dirty and looked as if it was badly looked after.

The defendant on the trial was allowed to amend his statement of defence by adding the following: "that the

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consideration for the note or agreement sued on wholly failed"; and "that the defendant purchased from the plaintiffs the outfit in question, and the note or agreement sued on was given in part settlement therefor, and that the plaintiffs did not deliver to the defendant the goods so sold, but delivered a portion of the goods, mixed with goods of a different description not included in the contract, viz., an engine of less horse power than that contracted to be sold, and the defendant rejected the whole."

The defendant endeavoured to prove that the sale to him of the threshing outfit was made by the plaintiffs, and not by Kirkpatrick, and that the defence above outlined was open to him. I am satisfied that this line of defence suggested itself to the defendant because of the order and note or agreement which were signed by the defendant being made in the name of the plaintiff company.

The defendant knew that there was a lien against the machinery, and it is reasonable to expect that he would ascertain from the plaintiff company what that lien was and what arrangement could be made with them. The defendant and Kirkpatrick called upon the agent of the plaintiff company at Brandon, one Percy, and the order for the machinery and the note or agreement sued on herein were made out. It is contended on behalf of the defendant that this is conclusive evidence of the sale being by the plaintiff company, and that they are estopped from denying the truth of that fact. With this I cannot agree.

Kirkpatrick himself swears that the sale was made by the plaintiff company, and not by him, and yet, in his letter to the plaintiffs of 19th February, 1906, he says: "The time you and your Mr. Cooper were at my place you made the remark, if I sold the thresher to a good man you would take his papers and give up mine; well it was sold to a good man," etc. His evidence is very unsatisfactory and unreliable, and I have no difficulty in concluding from a careful consideration of the evidence, that the sale was made by Kirkpatrick and that the note or agreement sued on was made out in the name of the company, as a matter of convenience, and whatever remedy the defendant might have as against Kirkpatrick he has none against the plaintiffs.

There must be a verdict for the plaintiffs for the amount sued for together with costs.

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MANITOBA.

FEBRUARY 26TH, 1907.

COURT OF APPEAL.

WALLACE v. SCOTT.

GALBRAITH v. SCOTT.

ROPER v. SCOTT.

Chattel Mortgage—Renewal—Affidavit of Mortgagee — Immaterial Variation from Statutory Form — "Kept on Foot"—"Kept Alive"—Mares Covered by Mortgage—Increase from Mares—Purchasers for Value without Notice—Future-acquired Property — Partus Sequitur Ventrem—Legal Estate in Progeny—Removal of Foal to another District—Re-filing of Mortgage—Necessity for.

County Court appeal.

Three actions of replevin brought against the same defendant for the recovery of horses. As the questions of law and fact involved in all the cases were in most respects the same, they were tried together by the County Court Judge. In giving judgment he expressed the opinion that the legal questions raised should be taken for determination to the Court of Appeal. He therefore entered a formal judgment for the plaintiff in each case.

H. A. Robson and Henry Price Blackwood, for defendant, appellant.

C. W. Bradshaw and G. Patterson, for plaintiffs.

The judgment of the Court (PERDUE and PHIPPEN, JJ.A.), was delivered by

PERDUE, J.A.:—On 14th September, 1901, one William McGill Brown executed a chattel mortgage in favour of defendant for $441.40, payable on 14th September, 1903, with interest at 12 per cent. per annum. The mortgage covered, amongst other things, two mares, and the description concluded with the words "and also the increase from the

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mares." The mortgage was registered on 17th September, 1901, and a renewal of it was filed on 15th September, 1903, and a further renewal on 8th September, 1905. After the making of the mortgage and during the time it was in force, as alleged by defendant, four colts were produced by the two mares described in it. Brown, the mortgagor, sold one of these colts to Gleeson & Johnson, who afterwards sold it to plaintiff Wallace. Brown also sold two of the colts to plaintiff Galbraith and one to plaintiff Roper.

These sales were made in 1905, or the early part of 1906. In May, 1906, defendant caused the colts to be seized under a warrant issued under the chattel mortgage. Plaintiffs then commenced the present proceedings in replevin to recover possession of the animals.

Several objections were taken to the validity of the renewals of the mortgage, but only one was reserved for consideration, the others having been overruled during the hearing of the appeal.

In each of the renewals of the mortgage in question, the affidavit of the mortgagee or his agent stated that the mortgage had not been kept "on foot" for any fraudulent purpose. This is the expression in R. S. M. 1892 ch. 10, sec. 7. That statute was repealed by the Bills of Sale and Chattel Mortgage Act of 1900, 63 & 64 Vict. ch. 31. Section 21 of this last mentioned Act provides for the filing of a statement shewing the interest of the mortgagee for the purpose of renewing the mortgage. With this statement is to be filed "an affidavit of the mortgagee . . . or of the agent of the mortgagee . . . that the statement is true, and that the mortgage has not been kept alive for any fraudulent purpose."

It is argued on behalf of plaintiffs that the expression "kept on foot" contained in the affidavits filed with the renewals of the mortgage under consideration does not comply with the statute, and that such an affidavit is not sufficient unless it contains the exact words mentioned in the section.

I cannot see that there is any material difference in meaning between the expressions "kept alive" and "kept on foot." There does not appear to have been any intention on the part of the legislature to make a change in the law in respect to the contents of the affidavit. The change appears to have been a mere verbal one, a choice of new words. The expression "kept on foot" was used in the

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Ontario statute: see R. S. O. 1897 ch. 148, sec. 18. It has since been used in the amendment to the Manitoba Act passed in 1904, 3 & 4 Edw. VII. ch. 2, sec. 1, providing for the renewal of mortgages made by incorporated companies. The phrase "on foot" is defined in the Century Dictionary, p. 2310, as meaning "in health or activity, in progress, going on." To say that a mortgage has been kept on foot implies all the meaning that could be conveyed by saying that it has been kept alive. Where the two expressions are substantially the same, and the one used in the affidavit is only a slight deviation from that contained in the statute, there is a sufficient compliance with the enactment: Emerson v. Bannerman, 19 S. C. R. 1. It is not necessary to use the exact words of the statute in this case if the same meaning is expressed by the use of other words. See O'Donohoe v. Wilson, 42 U. C. R. 329, and Barber v. Maughan, ib. 134. I think, therefore, the renewals were sufficient.

The next question to be considered is, did the chattel mortgage cover the offspring of the mares, produced after the making of the mortgages?

It was argued for plaintiffs that the same rule of law should be applied in this case as in the case of a mortgage covering goods to be acquired in the future, or chattels to be produced in the future, such as crops to be grown. It is well settled that such an instrument creates only an equitable charge upon the future-acquired property, which may be enforced against the mortgagor himself, and may prevail as against subsequent execution creditors of his. See Holroyd v. Marshall, 10 H. L. C. 191; Canada Permanent L. and S. Co. v. Todd, 22 A. R. 515; Bank of British North America v. McIntosh, 11 Man. L. R. 503. But if, when such after-acquired chattels come into existence, but before the mortgagee takes possession of them, the legal estate and interest therein, without notice of the mortgagee's existing interest, becomes vested in a purchaser for value, the latter is entitled to the future-acquired chattels comprised in the mortgage, and becomes the owner both at law and in equity: Joseph v. Lyons, 15 Q. B. D. 280; Hallas v. Robinson, ib. 288; McAllister v. Forsyth, 12 S. C. R. 1.

There is no evidence that plaintiffs had any notice of defendant's claim under the chattel mortgage as against the colts. They were shewn to have become purchasers for value of the animals, and to have received delivery of them

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before there was any act of possession exercised by defendant, and before anything further was done towards perfecting his title. If, therefore, this were a case in which defendant claimed the chattels in question simply under a provision in the mortgage, declaring it should apply to and include certain property that might be acquired thereafter, he would fail as against plaintiffs.

The defendant, however, asserts that the legal estate in the mares has been in him since the making of the mortgage, and that the legal estate in their offspring, since produced, is and always has been in him, upon the common law principle that partus sequitur ventrem. This principle is thus stated in Stephen's Commentaries, vol. 2, p. 22: "With respect to accession by breeding from animals, in particular, it has been held that of all tame and domestic animals the brood belongs to the owner of the dam or mother, the English law thus agreeing with the civil."

In Dillaree v. Doyle, 43 U. C. R. 442, it was held that in the case of the loan of a mare extending over several years, her offspring belonged to her owner, as against an execution creditor of the bailee.

In Temple v. Nicholson, reported in Cassels's Sup. Ct. Digest, p. 114, the property in the offspring of a mare, as between chattel mortgagees and an execution creditor of the mortgagor, was in question. The mare was included in the chattel mortgage, and, after default was made under the mortgage, the mare dropped a foal. The mortgage contained a clause permitting the mortgagor to remain in possession of the property until default. On default, the mortgagees were empowered to seize. It was held, affirming the judgment of the Supreme Court of New Brunswick, that the mortgagees were, after the default, the owners at law of the mare, and the foal having been dropped while they were such owners it was necessarily their property.

The chattel mortgage now under consideration contained no re-demise clause, but, under a fair construction of the terms of the mortgage, a condition might be implied that the mortgagor might remain in possession until default. I do not, however, see any distinction as regards the right of the defendant to the offspring of the mares, between the case of a foal dropped after default in the mortgage, and one dropped during its currency, but before default. The main point to be considered is, who had the legal estate in

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the foal? Applying the common law rule that the progeny belongs to the owner of the dam, then the ownership of the foal would, at common law, be in him who, at common law, was the owner of the mare. The defendant would, therefore, at common law, be the owner of the offspring, that is to say, he would take the legal estate. It would thus appear that as soon as the foals were dropped the property in them was in the same position as that in the mother. The legal estate in both was in the mortgagee, subject to the mortgagor's equity of redemption. If the mortgagor sold the foal to a third party for value, the latter would not acquire the legal title, he would only take an equitable interest.

The provision in the mortgage making the increase of the mares subject to the mortgage is important in shewing the true intention of the parties. It might be argued that, in the case of mares only useful for breeding purposes, the sole benefit a mortgagor could derive from the possession of them, and the only return he could receive for feeding and taking care of them, would be the foals they might produce; it might then be urged that these should be considered in the same light as any other produce derived from farming operations. Whatever might be the effect if circumstances like those suggested arose, it is sufficient in the present case to shew that such a contention is excluded by the terms of the mortgage, and that the express intention was to make the foals, as well as their mothers, subject to it. The provision in question gave to the mortgagee an equitable right to claim the increase from the mares as part of his security, and, having the legal estate also, his claim should prevail as against the mere equitable right of a purchaser for value without notice.

In one respect the case of Roper v. Scott differs from the other two cases argued at the same time. Roper purchased the horse claimed by him on 25th March, 1905, removed it from the Deloraine district, in which the mortgage was registered, to the Hartney district, where he had it in his possession for over a year prior to its seizure by defendant. A certified copy of the mortgage had not been registered in the Hartney district pursuant to sec. 29 of the Bills of Sale and Chattel Mortgage Act. This section provides: "In the event of the permanent removal of goods and chattels mortgaged, from one judicial division in which the goods and chattels were at the time of the execution of the mortgage

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to another judicial division . . . a certified copy of the mortgage . . . shall within 6 months from such removal be registered with the clerk of the County Court of the judicial division to which the goods and chattels or any portion thereof are removed, otherwise the said goods and chattels shall be liable to seizure and sale under execution, and in such case the mortgage shall be null and void as against creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith, for good or valuable consideration, as if never executed."

A provision almost completely similar to the above was construed in Hulbert v. Peterson, 36 S. C. R. 324, an appeal from a decision of the Supreme Court of the North-West Territories. The Supreme Court of Canada held that "the subsequent purchaser" in such a case must be one who purchased after the expiration of the time limited for re-registration in the district to which the goods had been removed, and that, although such re-registration had not taken place, it was valid as against a purchase made within such time.

The same construction has for many years been placed upon the corresponding statute in Ontario: see Clark v. Bates, 21 C. P. 348, and Hodgins v. Johnson, 5 A. R. 449.

The contention of plaintiff Roper, therefore, that the mortgage is void as to him must also fail.

The appeals in all three cases will be allowed with costs and judgment entered for defendant in the County Court in each case.

Plaintiffs must also pay the costs in the County Court.

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MACDONALD, J. MARCH 6TH, 1907.

TRIAL.

SAWYER AND MASSEY CO. v. WADDELL.

Sale of Goods—Conditional Sale—Condition not Complied with by Vendor — Dismissal of Action for Price — Charge on Land—Execution of Document Procured by False Representations.

Action for the price of machinery and to enforce a lien therefor against defendant's land.

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C. P. Fullerton and Henry Price Blackwood, for plaintiffs.

A. E. Hoskin and H. A. Burbidge, for defendant.

MACDONALD, J.:—Plaintiffs were the owners of a second-hand 18-horse power engine and Waterloo separator with J. I. Case bagger and 150 feet S. H. rubber belt, which they allege they sold to defendant for $500.

The sale is evidenced by an agreement in writing signed by defendant and dated 27th September, 1905, which agreement contains a warranty, but it is expressly stated that the warranty does not apply to second-hand machinery.

It provides for the payment of the purchase price as follows: $50 on 1st May, 1906; $150 on 1st May, 1907; $150 on 1st May, 1908; $150 on 1st May, 1909. Purchaser's promissory notes to be given for each of the above; payments with interest, as in agreement stated; and it is further provided that unless the notes are executed and delivered before the machinery is used and within 10 days after the delivery of the machinery, then and in such case the whole contract price shall become due and payable forthwith.

Indorsed on this agreement is a description of defendant's lands, together with a charge under the hand and seal of defendant upon the same for the indebtedness by the agreement created.

Defendant refused to execute and deliver the promissory notes called for by the agreement, by reason of which, plaintiffs allege, the whole contract price became due and payable; and they sue to recover the amount thereof, and also ask that the land of the defendant, upon which they allege a charge is created, may be sold to realize the amount of their claim.

Defendant's ground of refusal is that the sale was a conditional one, the condition being that if the machine did not do good work he was not obliged to keep it. Plaintiffs, through their agents, on the other hand, assert that there was no such condition.

W. W. Badgley, general agent of plaintiffs, who accompanied J. T. Walkey, the local agent, on the first interview with defendant, says that he told him that they would not warrant the machinery, and, to use his own expression, says that he told him he would have to take it, as he did his wife, for better or worse.

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Defendant is an intelligent man, and I am satisfied he would not purchase under any such conditions. It is not alleged, however, that he purchased on that occasion; subsequently Walkey called and secured the execution of the agreement referred to.

That defendant did not know the nature of the document he was signing, I am quite satisfied. Walkey admits that he got the description of defendant's land without consulting defendant, and defendant was in utter ignorance of the fact that he was creating a charge against his land. Defendant did not read the agreement, but relied on Walkey's representation as to its contents, which representations were untrue.

Defendant, a short time after taking possession of the machinery, persistently refused to give his notes, asserting that the machinery did not work well, and plaintiffs through their agents were unable to make it work satisfactorily.

The sale was a conditional one, the condition was not complied with, and the action must be dismissed with costs.

MANITOBA.

MACDONALD, J. MARCH 6TH, 1907.

TRIAL.

LE NEVEU v. McQUARRIE.

Vendor and Purchaser — Contract for Sale of Land—Purchaser Taking Possession—Default in Payment of Purchase Money—Notice of Cancellation—Conditions of Contract not Complied with — Specific Performance — Repossession — Account of Profits — Misrepresentations—Damages.

In February, 1904, plaintiff bought certain farm lands from defendant, and brought this action to enforce specific performance of the agreement and for damages for misrepresentation, and for being ejected from the farm.

Defendant pleaded that plaintiff did not comply with the terms of the agreement, which was thereupon rescinded.

H. A. Robson and J. R. Haney, for plaintiff.

J. H. Munson, K.C., and G. H. Davis, for defendant.

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MACDONALD, J.:—The plaintiff, under agreement in writing dated 19th February, 1904, purchased from defendant the north-east quarter of lot 35 in township 13 east of the principal meridian and part of the south-east quarter, for $5,000, paying a deposit at the time of the purchase of $1,000, and immediately thereafter entered into possession. The balance of the purchase money was payable in instalments as follows: $200 upon 1st January, 1905; $200 upon 1st January, 1906; $200 upon 1st January, 1907; $200 upon 1st January, 1908; and $3,200 upon 1st January, 1909; together with interest at the rate of 7 per centum per annum, to be computed from 18th February, 1904, and to be paid yearly on each 1st day of January.

The agreement (inter alia) provided that "in case the purchaser shall at any time make default for two months in any of the payments by him agreed to be paid, or in any parts thereof, the vendor shall be at liberty, at any time after such default, by giving to the purchaser one month's notice in writing, either to cancel the contract and declare the same void and forfeit any payments that may have been made on account thereof, and retain improvements, or to proceed to another sale of the lands, and the deficiency by such re-sale (if any) shall be made good by the purchaser, and the vendor shall be entitled immediately upon any default, without giving any notice or making any demand, to consider and treat the purchaser as his tenant, holding over without permission or any colour of right, and may take immediate possession of the premises and remove the purchaser therefrom."

At the time of the purchase the lands in question were subject to a mortgage to the Law Union and Crown Insurance Company for $2,000, with interest at 7 per cent., and in the agreement of purchase it is provided that on or before the payment of any and every instalment of principal and interest falling due, the vendor (defendant) shall produce to the purchaser the receipt of the insurance company for the payment of the last instalment of principal and interest due under their mortgage, and in case of the non-production of such receipt the purchaser shall be entitled to retain so much of the instalment and interest due as shall be sufficient to discharge the instalment of principal and interest then due to the insurance company.

Defendant, on 30th June, 1904, assigned his agreement with plaintiff to one Bernard H. Taylor, and all his interest therein and in the lands therein described; such assignment

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contained no covenant by defendant in event of non-performance by plaintiff of any of the covenants in his agreement with defendant.

After harvest of 1904 plaintiff paid the interest on the mortgage against the property to the Law Union and Crown Insurance Company, and also $120 to Barker, being the interest due under the agreement of sale assigned to him.

The crop of 1904 was a very poor one, and plaintiff did not make payment of the instalment of principal of $200 due on 1st January, 1905, nor did Barker, the assignee of the agreement, insist upon such payment being made.

In 1905 the crop was also very poor, and plaintiff became financially embarrassed, and was obliged to seek employment off the farm, having first arranged with one Grundy to occupy the premises and keep the place in order; plaintiff left the farm in November, 1905, but returned the following March.

Plaintiff made some preparation in 1905 for the farming of 1906, broke 20 acres of new land, but, owing to early frost in 1905, was unable to prepare stubble that year for the seeding of 1906. It was not plaintiff's intention to work the farm himself in 1906; he intended to rent it, and work out until he got out of his financial difficulties; he arranged with one McKay to enter into possession and look after the place for him, and in April, 1906, McKay took possession.

On 19th March, 1906, Taylor, who was the assignee of the agreement of purchase referred to, re-assigned the agreement to defendant, the latter then knowing that plaintiff was in default in payment of interest and principal under his agreement.

On 26th March, 1906, defendant served plaintiff with a notice of cancellation of the agreement of sale and purchase, and in the latter part of April met defendant in Stonewall, when he told him he had come to take possession of the property, to which plaintiff objected, and on 28th April, 1906, plaintiff not having in the meantime made good the default under his agreement with defendant, the latter entered upon and took possession of the premises.

After defendant entered into possession, and about 15th May, 1906, plaintiff caused defendant to be tendered all arrears due under the agreement of sale, which defendant refused, relying on his rights of cancellation under the terms of the agreement.

Plaintiff also alleges that, before the execution of the agreement of sale, and in order to induce him to execute it,

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defendant falsely and deceitfully represented to him that the lands were clean and free of noxious weeds and in a fit state with ordinary cultivation to produce a fair crop, whereas the lands were full of noxious weeds, and that, relying upon such representations, plaintiff agreed to purchase. The evidence is conflicting on this point. Ira Stratton, who was acting for the parties in the negotiations for the sale, says he considered it a dirty farm, and a year or two before the time of sale, a very dirty farm, and at the time of sale, an average dirty farm; he says that defendant said it was in a fit shape for plaintiff to make payments under agreement out of the farm, but would not swear that defendant said it was free from dirt, and he also swears that he told plaintiff there was some dirt, and that plaintiff was more taken by the locality than by the quality of the soil, and that he spoke of going in for mixed farming, wheat not being the chief feature.

John P. Matheson, who was noxious weed inspector, swears that the farm compared favourably with other farms in the district, and that its condition when sold was better land, cleaner, and buildings in better shaepe than at any time during defendant's ownersip of it.

Plaintiff claims damages for these alleged misrepresentations. I find, however, that plaintiff did not rely on the statements of defendant, nor can I indeed find that any such representations as are alleged were made by defendant. The farm is evidently a fairly good one, equal to the average in the district, and during the defendant's occupancy of it yielded average good results.

Plaintiff further claims specific performance of the agreement of sale, possession of the lands, and damages for the refusal of defendant to deliver up possession of the lands.

It is contended on behalf of plaintiff that the time for payment of the instalment of purchase moneys due 1st January, 1905, was extended for one year.

Plaintiff on 26th December, 1904, wrote to Mr. Taylor, the assignee of the agreement of sale, as follows: "I regret to inform you that I am unable to meet the payment of $200 on the principal this year, having been unfortunate with my crop through rust, which, though one of the finest looking crops in the district, only realized half what it should have done otherwise; I have to request your indulgence in this matter, and to ask you if you will consent to let me pay this amount by adding one-third of it to the payment of 1906-8."

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Mr. Taylor evidently consented to this, for on 12th January, 1906, he wrote defendant asking for information about plaintiff, and says: "When I extended the time for the payment of the last instalment he promised to add one-third to the payment due January 1st, 1906, but to date I have heard nothing from him."

Plaintiff made default in the instalment due 1st January, 1906, and defendant, having been re-possessed of the agreement by the re-assignment referred to, caused plaintiff to be served with a notice of cancellation, which notice is to the effect that, unless payment be made, within 30 days from the date of the notice, of the arrears of principal and interest under and by virtue of the terms, conditions, and covenants contained in the agreement, and unless the conditions contained therein are complied with, within 30 days from the date of the notice, the agreement shall be void, and all rights and interests thereby created shall cease, and the lands shall revert to and re-vest in defendant; and it is through the effect of this notice that defendant claims the cancellation of the agreement and the re-vesting in him of the lands in question.

The agreement provides that in case the purchaser shall make default for two months in any of the payments, the vendor shall be at liberty, at any time after such default, by giving to the purchaser one month's notice in writing, either to cancel the contract and declare the same void or to proceed to another sale, etc.; the defendant decided to cancel the sale by notice.

The agreement entitles him to declare it null and void after two months' default by giving one month's notice in writing, not 30 days' notice. To entitle defendant to cancel the agreement of sale under the powers vested in him by the terms of the agreement, he must be held to a strict observance of the provisions under which cancellation can be effected. In my opinion, the notice of cancellation is inoperative and of no effect. Plaintiff is entitled to a specific performance of the agreement, and, upon payment of all arrears due under the agreement between him and defendant, to possession of the lands and premises in question.

Plaintiff is also entitled to an account of the result of the working of the farm by defendant for the year 1906, and to the profits arising therefrom, and there will be a reference to the Master to ascertain the amount due plaintiff. Plaintiff is entitled to costs.

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MANITOBA.

MARCH 7TH, 1907.

COURT OF APPEAL.

COPELAND-CHATTERSON CO. v. HICKOK.

Master and Servant—Contract of Servant not to Engage in Business Similar to Master's after Leaving Employment —Absence of Consideration—Void Contract.

Plaintiffs carried on a stationery business in Manitoba and elsewhere in Canada, and furnished supplies for loose-leaf systems of book-keeping, and supplied experts to advise on office management and to introduce the loose-leaf system of book-keeping and sold loose-leaf ledgers and other supplies.

In February, 1906, the plaintiffs engaged defendant as confidential clerk, and placed him in temporary charge of their Winnipeg office. An agreement was made between them, by which defendant was not to engage in any other line of business, and agreed that he would not, within one year after the termination of his employment with plaintiffs, engage or be interested in any business or work within Canada or Great Britain in competition with the business of plaintiffs.

Plaintiffs alleged that in June, 1906, in violation of the terms of the contract, and while still in the service of plaintiffs, defendant began business in the city of Winnipeg in the name of the "Western Systems," a company which engaged in the same business as plaintiffs.

This action was brought for an injunction to restrain defendant from continuing work in competition with plaintiffs, and from so manufacturing, soliciting orders, and selling loose-leaf ledgers, and other book-keeping supplies.

Defendant alleged that while in the service of plaintiffs he was approached by one W. H. Huyck employed by plaintiffs, who represented to him, defendant, that plaintiffs desired to increase his salary and employ him in a more important capacity, and proposed that he should sign a memorandum of agreement as a condition precedent to his receiving the additional remuneration and more important employment, but he asserted that plaintiffs failed utterly to carry

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out the proposal made to him by Huyck, and that there was no consideration for the memorandum of agreement, that it never came into effect, and was not binding on him, defendant. On the failure of plaintiffs to advance his salary and change his employment, he determined to leave their employment, and in fact did so in June, 1906.

The action was tried before MACDONALD, J., without a jury.

J. B. Coyne, for plaintiffs.

J. B. Hugg, for defendant.

MACDONALD, J.:—Defendant entered into the employ of plaintiffs as a salesman at Winnipeg in May, 1905, at a salary of $75 per month.

In February, 1906, plaintiffs, contemplating certain changes in their business, sent Mr. Huyck, assistant to the general manager of the company, to Winnipeg with a letter of instructions with reference to the Winnipeg territory.

In that letter the general manager expresses the desire that defendant should take temporary charge of the Winnipeg office and look after all matters pertaining thereto, such as correspondence, expenses, etc., advising also of the issue of a new price book which is about to be placed in the hands of plaintiffs' employees, but before doing so insisting upon a contract being signed by the employees.

Mr. Huyck arrived in Winnipeg in the latter part of February, and on the 23rd of that month had an interview with defendant, when the agreement referred to in the letter of instructions was signed by defendant, and he entered upon his new duties in temporary charge of the Winnipeg office, and in this he continued until he resigned on 4th June, 1905.

The agreement signed by defendant on 23rd February, 1906, contains the following clauses:—

"The salesman agrees to keep private the company's price book with which he has been intrusted, and not to copy it or permit disclosure of its contents to any other person."

"The salesman will not, within one year after the termination of his employment with the company, engage or be interested in any business or work within Canada or Great Britain in competition with the business of the company"—followed by a penalty in case of breach, which penalty is not in any way to interfere with any right the company would

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have had, had the agreement contained no provision for such penalty.

Defendant, after the acceptance of his resignation by plaintiffs, entered into business similar in character to that carried on by plaintiffs, and in contravention of the agreement in part above recited; and plaintiffs bring this action to restrain defendant from continuing in such business for the term of one year from the termination of his employment with them, and for damages for breach of his contract.

Defendant contends that at the time of the execution of the agreement mentioned he was promised the position of manager at Winnipeg, with an increase of salary, and that he signed the agreement upon the condition that such appointment and increase of salary should be made, and that plaintiffs having failed to make good their promise he was justified in resigning and was not bound by the agreement. I have no doubt defendant expected that appointment and the increase in salary, but I am equally satisfied from the evidence and from the actions of defendant that this was not a condition of the coming into effect of the agreement he signed. I find that there was a consensus ad idem and a binding contract entered into.

It is contended on behalf of defendant that he being at the time in the employ of plaintiffs, there was no consideration for the entering into the agreement, and that the same not being under the seal is, therefore, nudum pactum.

I think there was a sufficient consideration; the letter of instructions from the general manager made it obligatory that the agreement be executed before handing over the company's price book, and non-compliance would doubtless lead to a dismissal; there was, furthermore, the appointment to a more important position, that of temporary manager; this, together with the handing over of the price book, constituted a sufficient consideration.

Another ground of defence is, that the agreement is not required for the protection of plaintiffs, and is against public policy, and is unreasonable and void.

That it is not required for the protection of plaintiffs and is against public policy, because the demand for plaintiffs' goods was beyond their capacity to fill, is not a good ground of defence. There is some evidence that orders came in so rapidly that plaintiffs were unable to make prompt deliveries; it is asserted on behalf of plaintiffs, and the evidence justifies me in finding, that they were enlarging their capa-

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city, and it would be but a matter of a short time when they would be in a position to fill all orders with reasonable promptness and despatch. Supposing, however, that plaintiffs could not supply the demand, that fact could not justify defendant in violating his agreement with plaintiffs.

The only issue remaining, and the most important one to consider, is that the contract is in general restraint of trade, and therefore void.

Defendant contends that the restraining clause in the agreement is too wide, and that it applies to any business that plaintiffs may thereafter engage in, and cites Baker v. Hedgecock, 30 Ch. D. 520, as in point; in that case the agreement restrained the defendant, who was a tailor, from carrying on any business whatsoever during the continuance of his employment or afterwards during the further period of two years.

The restraining clause in the agreement under consideration is in effect that defendant will not, within one year after the termination of his employment, engage or be interested in any business in competition with the business of plaintiffs; that must be interpreted to mean the business carried on by plaintiffs at the time of the execution of the agreement, and the words of the agreement are not wider than is necessary for the protection of plaintiffs.

I think the agreement entered into between the parties is reasonable, and plaintiffs are entitled to an injunction restraining defendant from carrying on the business of manufacturing, selling, soliciting orders for, and furnishing, loose-leaf ledgers and other book-keeping supplies incident thereto, and introducing the loose-leaf system of book-keeping.

Plaintiffs are also entitled to damages to the extent of $100, as provided in the agreement entered into between the parties, together with costs.

Defendant appealed to the Court of Appeal, and his appeal was heard by RICHARDS, PERDUE, and PHIPPEN, JJ.A.

The same counsel appeared.

RICHARDS, J.A.:—It seems to me that there was no consideration for the giving of the promise or agreement not to engage in business. It is urged that defendant would have been dismissed if he had not signed the paper, and that the continuing him in his employment was a consideration for his signing. It seems to me that that is only a matter of

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conjecture. He was not told that dismissal would be the consequence of his refusal to sign, and no promise was made to continue him in the employment. There was no change in his employment, and no new employment or contract of hiring. It is said that he was made temporary manager at Winnipeg as a result of his signing. There is no evidence that it was so agreed. Huyck's instructions to make defendant temporary manager were not expressed to be conditional on his signing the paper, and Huyck expressly says there was no discussion over the signing, further than that he told defendant that plaintiffs wished him to sign. In any case the temporary managership was not accompanied by any increase of pay, or any terms or conditions. It was, I think, merely such an assignment of new duties as may be made to any clerk within the reasonable scope of the already existing employment. The giving defendant the price book was not a consideration. It was given for plaintiffs' benefit and not for defendant's. Its object was to enable defendant to more readily do his work for plaintiffs, and thus to enable plaintiffs to get more profit out of the work.

For lack of a consideration, I think defendant's promise not to engage or be interested in the business named, is not enforceable.

With the utmost deference, I cannot for the above reasons agree with the trial Judge's findings.

I would allow the appeal with costs.

Appeal allowed with costs. The judgment entered in the Court of King's Bench to be set aside and the injunction refused, and judgment entered for defendant with costs. We allow defendant no damages on account of the granting of the injunction in the King's Bench.

PERDUE, J.A.:—On the ground of want of consideration for the contract, I would allow the appeal with costs.

I think no consideration whatever was shewn for entering into the contract set out in the statement of claim.

Appeal allowed with costs and action dismissed with costs.

PHIPPEN, J.A., concurred.

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MANITOBA.

MATHERS, J. MARCH 8TH, 1907.

TRIAL.

HEATH v. McLENAGHAN.

Contract—Sale of Land—Reformation—Omission of Provision as to Acceptance of Whole Purchase Money—Mistake—Abandonment of Option—New Agreement—Costs.

Suit to reform an agreement.

On 4th June, 1906, defendant gave to plaintiff Heath an option in writing upon his farm adjoining Portage la Prairie at $60 per acre. The document provided for the payment of $100 to defendant's credit at the Bank of Montreal in Portage la Prairie at the time of exercising the option, which payment was to operate as an acceptance on Heath's part of the sale to him, or his assigns, of the land. It also provided that the option should remain in force until 4th July, 1906, and should not be cancelled thereafter without giving Heath or his assigns 10 days' written notice. A further sum of $900 was to be paid within 30 days from the payment of the $100 before mentioned, $4,000 on 1st March, 1907, $5,000 on 1st March, 1908, and the balance on 1st March, 1909, with interest at 6 per cent. per annum until paid, "with the right of paying off the whole of said purchase price or any portion thereof at any time without any bonus."

On 4th July Heath paid $100 into the Bank of Montreal, and notified defendant that he had done so.

It was then arranged between Heath and defendant that a formal agreement of sale should be drawn up and executed.

Heath had sent away the original option, but had kept a copy, and he handed this copy, with a memorandum pinned to it, to his solicitor, as his instructions for the preparation of the formal agreement. The new agreement was drawn and submitted to defendant's solicitor, after which it was executed by both parties. On the same day Heath executed an assignment of it to his co-plaintiff, to whom he had sold the land upon the terms and conditions stated in the option before referred to, with an additional term as to right of entry to do ploughing after harvest.

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The new agreement did not contain the provision allowing the payment of the purchase money at any time without bonus, and this action was brought to have the agreement reformed in this respect.

A. C. Galt and G. D. Minty, for plaintiffs.

A. Meighen, for defendant.

MATHERS, J.:—The action is opposed upon two chief grounds: first, that defendant, owing to defective eyesight, could not read the paper which he signed as an option, and that Heath, although requested to read the document, only read the portion relating to the price and terms of payment other than that relating to pre-payment, stating that it was not necessary to read it all. Heath, on the other hand, says that he not only read the entire document to defendant, but the portion as to terms of payment he read over twice. Defendant admits that the portion stating the price to be paid was read twice. That he says was the question he was most concerned about. He wanted to know the exact amount of money that was to be paid, and that he was not to be liable for any agent's commission, and he did not pay much attention to the rest. He knew the document contained other provisions in addition to the price to be paid, but says that upon Heath telling him it was not necessary to read the balance of the document, he signed it without knowing what these other provisions were. Defendant is a shrewd, careful man, and it is to me inconceivable that he would sign a document which he knew contained provisions concerning the purport of which he was in absolute ignorance. I find, therefore, that defendant knew of the provision permitting payment at any time when he signed the option. The fact that subsequently, when requested by Stephens to take a portion of the purchase price and convey part of the land, he refused, insisting that the whole purchase price should be paid, convinces me that he had no rooted objection to accepting all his money at any time, and would probably pass over such a provision in the option when read without paying much attention to it. Defendant denies that he gave Stephens to understand that he was willing to accept the whole balance payable, but he admits that, when Stephens asked him to accept $5,000 and convey 100 acres of the land, he said "you might as well give me all," to which Stephens replied that he could not do that. Defendant then promised to give a definite answer as to whether or

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not he would release a portion of the land, in the afternoon. In the afternoon of the same day Stephens met defendant in town and asked him what he was going to do, and he says defendant's reply was "You had better pay it all," and he, Stephens, said he would make arrangements. Defendant, on the other hand, says he was then on the way to his solicitor's office, and that he told Stephens, in reply to his question, that he did not know what he would do. Stephens the same day arranged with his bankers for the whole of the money, and left a cheque there for defendant. This was on a Saturday, and, failing to see defendant again that day, he drove out to his place the following Monday and told him the money was ready for him. Defendant then said he would not take the money unless he got a bonus; he says $1,000; Stephens says he asked for $2,000.

I am convinced that, from the beginning, defendant thought he was bound to accept the purchase money at any time, and that he was quite willing to do so until he had consulted his solicitor, and found that the agreement did not contain a provision to that effect.

The other principal ground of defence is that the option was abandoned by Heath, which abandonment was acquiesced in by defendont, and that the agreement sought to be reformed was a new and independent agreement entered into without any reference to the written option previously given.

The evidence in support of this contention is that Heath, on the very day on which he paid the $100 into the bank pursuant to the terms of the option, told defendant on two different occasions that he could not take the land unless defendant reduced the price to $58 per acre, and, on defendant refusing, said that the deal was off, to which defendant replied that he was just as well satisfied. The last of these conversations took place, he says, about an hour before the money was paid in. Heath admits that he endeavoured to get defendant to reduce the price to $58, but denies that he said to defendant that the deal was off. He says that at the second conversation alluded to by defendant he told him he was going to accept the option. A short time afterwards he paid the $100 into the bank to the credit of defendant, and defendant accepted the money.

In my opinion, the defendant has entirely failed to establish that the option was abandoned. I have no doubt that when Heath paid the $100 into the bank he did so pursuant to the terms of the option, and when defendant accepted the

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money he did so knowing that it had been so paid in, and knowing and intending that what had hitherto been an option only, thereby became a binding agreement of sale.

I have no hesitation, on the evidence, in holding that the clause respecting payment at any time was omitted from the extended agreement by pure inadvertence in the solicitor's office and without the knowledge or concurrence of either party. The mistake was mutual, and plaintiffs are now entitled to have the agreement reformed by the insertion of this omitted clause.

As to the question of costs, defendant's counsel asked that in the event of deciding against him there should be no costs, and cited Murray v. Parker, 19 Beav. 305. It is true the Master of the Rolls in that case refused plaintiff costs on the ground that the suit had been occasioned by his own error in not having the document sought to be reformed properly prepared. I cannot find, however, that the Courts have laid down any general principle applicable to cases of this kind as distinct from other classes of actions. In this case defendant, after having agreed to accept his money, refused to do so, and I cannot avoid the conclusion that his refusal was actuated by a desire to take an unfair advantage of the error in the preparation of the formal agreement. Even if he had forgotten about the provision for prepayment in the option, his persistence in resisting reformation after it was brought to his attention disentitles him to any exceptional consideration.

Plaintiffs are entitled to the costs of the suit.

MANITOBA.

MATHERS, J. MARCH 8TH, 1907.

TRIAL.

GRANT v. REID.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance or Damages—Defendant Contracting to Sell Land not Owned by him—Written Contract not under Seal—Purchasers not Named—Statute of Frauds—Cheque of Third Person—Agency for Purchasers Disproved—Failure of Action—Costs.

Action for specific performance of a contract, or for damages for breach of contract.

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S. R. Laidlaw and C. W. St. John, for plaintiffs.

G. A. Elliott and M. G. Macneill, for defendant.

MATHERS, J.—In October, 1906, plaintiffs became desirous of acquiring, for speculative purposes, lands in Elmwood, a village on the east side of the Red river, which had recently been added to the city of Winnipeg. With this object in view, they interviewed one McPhail, on estate agent having his office in Elmwood. He represented to them that he had the lot in question listed for sale.

As a matter of fact, he had not the lot for sale, and did not even know who the owner was.

Plaintiffs intimated that they would be willing to pay $2,000 for the lot, without the buildings, one-third cash and the balance in one and two years.

Happening to meet defendant shortly after this, McPhail asked him if he knew who owned the lot beside the fire hall, that being the one in question. On receiving an affirmative answer, he told defendant that if he, defendant, could buy this lot from the owner, he, McPhail, could turn it over at about $2,000.

Defendant interviewed the owner, and ascertained that he was willing to sell for $1,400 with the house then on the ground, or $1,200, with the privilege of removing the house.

Defendant then informed McPhail that the land could be got, and shortly after McPhail went to defendant's house where the following document was drawn up and signed by defendant:—

"Oct. 31, 1906."

"Lot 186, plan No. 514, D.G.S., 67, St. Boniface, for which I agree to sell for the sum of $2,000; one-third cash and purchaser to assume the mortgage of $300, balance one and two years, interest at 6 per cent. It is understood that the buildings are not to be included in purchase price, and the vendor to be given 30 days to remove same. I hereby acknowledge receipt of cheque, value $100, as deposit on same."

"Witness:

"J. K. Hardy." "W. H. Reid" (seal.)

The document bears a seal, but it was explained that it was put there by Hardy, the witness, after the execution of the document by the defendant and without his knowledge or authority.

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At the time this document was signed, defendant was not the owner of the lot mentioned, nor had he any interest in it. He had ascertained that the owner was willing to sell for $1,200, but he had not agreed to purchase at that or any other figure. He wanted to play perfectly safe, and he took the risk of entering into an agreement to sell the property he had no tittle of interest in, believing that he could afterwards go to the owner and buy in the property at some $800 less than the figure at which he had sold, and thus put himself in a position to carry out his contract.

As the document signed by him did not bind the purchaser to take the property, the defendant insisted on being paid something as a guarantee that the property would not be left on his hands.

To satisfy defendant on this score, McPhail gave defendant his own cheque for $100, which is the cheque referred to in the agreement. Just after the document was executed, McPhail met the owner, who, on being informed that he would have to remove the buildings in 30 days, declared that he would not sell, and apparently he has adhered to that resolution since. For that reason the defendant has not been able to carry out the agreement he entered into.

Plaintiffs base their action upon the above quoted document, coupled with the cheque given by McPhail to defendant. These two papers, they contend, supply all the terms of a complete agreement within the 4th section of the Statute of Frauds.

It is quite manifest that the document in itself is not a compliance with the statute, as it does not contain the name of the purchaser, or anything to indicate who the purchaser is. But it is said McPhail was the agent of the purchasers, and his name signed to the cheque supplies the omission under the authority of Pearce v. Gardner, [1897] 1 Q. B. 688, and, as the document is not under seal, plaintiffs may bring the action in their own name to enforce a contract made in the name of their agent. It is clear, however, that if McPhail was not plaintiffs' agent, the defect in the document is not supplied by his signature to the cheque.

McPhail swears he was plaintiffs' agent, and that he was buying the property for them, as such, but plaintiffs seem to have taken an entirely different view of their relations to McPhail, and he, of course, could not become their agent without their consent.

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I quote from the plaintiff Summer's examination for discovery:—

Q. McPhail quoted the property in question as one that he had listed with him for sale? A. Yes.

Q. He told you it was listed with him for sale at $2,000 for the bare property, the owner to remove the building, or $2,200, building and all? A. Building and all. Yes.

Q. You then told him you would take it for $2,000, without the building? A. Without the building, and to be sure to put in a clause in the receipt that the building be removed within 30 days.

Q. McPhail knew that you were buying for yourselves? A. Oh, yes.

Q. And this was an offer that you made to him as agent of the owner? A. We understood him to be the agent of the owner, yes.

Q. And, believing that, you made him this offer to purchase at that price and upon those conditions? A. Yes.

Q. As your co-plaintiff has stated, you were not to pay McPhail anything? A. Purely a real estate transaction. A real estate purchase by us from Mr. McPhail as agent of the owner.

Q. McPhail was not your agent in any way? A. Only in the way of a real estate agent being agent between both parties. We went to him as a purchaser, and he was acting carrying out our instructions, of course. He was making a sale for the other party to us.

Q. You were the purchasers, and McPhail had the property for sale as agent of the owner? A. That is what I understood.

The plaintiff Grant says that he and his co-plaintiff had, on several occasions, been shewn by McPhail properties that he had for sale, and then the examination continues:—

Q. And the property in question was one of them? A. Yes.

Q. Were you to pay him anything in case you bought from him? A. If you came to our office, Mr. Elliott, and bought a piece of property, would you pay us for buying it?

Q. I would not, Mr. Grant, and that is the position you took with Mr. McPhail, that you were buying property from him as the agent of the owner? A. Well, of course, we would not buy property from him, we bought it through him.

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Q. Through him as agent of the owner? A. That is what we thought.

It seems to me impossible to hold upon that evidence that McPhail was, in any sense, the agent of the plaintiffs. I am satisfied that he was not, and that the idea of McPhail being their agent did not occur to the plaintiffs until it became apparent that in the absence of that fact being established they had not an agreement within the Statute of Frauds.

The action must be dismissed, but, as the defendant's reckless conduct in agreeing to sell what he did not own, is responsible for all the trouble which ensued, there will be no costs.

MANITOBA.

MATHERS, J. MARCH 8TH, 1907.

TRIAL.

TOWN OF EMERSON v. WRIGHT.

Receiver—Accounts—Municipal Corporation—Trustee for—Discount Allowed on Taxes—Interest Lost by Receiver not Depositing in Bank Moneys Collected—Liability—Counterclaim—Costs.

In March, 1894, the plaintiffs, the municipal corporation of the town of Emerson, were in default in the payment of the interest upon their debenture debt of $105,000. The government of Manitoba had, under the provisions of ch. 47 of 52 Vict., guaranteed the interest at 3 per cent. upon this debenture debt for 20 years. The plaintiffs were unable to pay this interest, and the government had been compelled to advance for that purpose the sum of $4,107.36; and there were no funds of the plaintiffs available either to meet this arrears or the interest accruing due for the then current year, amounting to $3,150.

The mayor and council having resigned in a body, the legislature assumed control of the town's affairs, and passed an Act, ch. 10 of 57 Vict., vesting the control and management of the town in a receiver to be appointed by the government. The Act provided that the receiver should have all

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the powers and authority theretofore exercisable by the mayor and council, and by the clerk, treasurer, assessors, and collectors, under the Municipal Act and Assessment Acts then in force.

By an order in council, assented to on 26th March, 1894, the defendant was appointed receiver of the town under the provisions of the above mentioned Act.

He at once entered upon the duties of his office and continued to discharge such duties until 26th February, 1901, when his appointment was cancelled, and the plaintiff Unsworth appointed in his place. An advisory board of three was also appointed by order in council to assist the new receiver.

Shortly after the apontment of the new receiver, one Halse was appointed by the government to make an audit of the books kept by the defendant as receiver. The auditor reported on 30th May, 1901, and in his report he found that the defendant was indebted to the town in the sum of $1,250.52. This amount was made up of alleged shortages in cash on town account of $957.49, extending over the years 1894 to 1901 ; $224.95 interest at 9 per cent. upon the above amount; and $68.08 interest on arrears of taxes which defendant had not collected, and with which the auditor for that reason charged him, making a total under this head of $1,250.52. In addition to this, the report stated that taxes to the amount of $322.60 had been omitted from the tax rolls extending over the years 1893 to 1899. These taxes the auditor thought the defendant should be charged with, and also with interest thereon amounting to $124.60, making a total of $447.20.

The defendant disputed the accuracy of the auditor's report, and asked permission from the plaintiff Unsworth to review with an accountant the books and vouchers then in Mr. Unsworth's custody. This permission was at first granted, but afterwards withdrawn on the plea that he could not grant it without further authority.

On the 28th June, 1901, defendant addressed a letter to the receiver and advisory board asking permission to review the books and vouchers of the town and school board during the term of his office as receiver, in company with a competent accountant.

This request was again refused, and defendant was advised by Mr. Unsworth that he would be pleased to receive

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from the defendant a statement of his objections to Mr. Halse's report in writing.

Defendant on 3rd September sent to the receiver and advisory board a statement in detail of his objections to the report. A meeting was arranged for 20th September to consider the auditor's report, at which defendant was advised by plaintiff Unsworth in a letter dated 19th September that there would be present members of the advisory board, the plaintiff Unsworth, and auditor Mr. Halse, the defendant, "and nobody else," the last four words being in capital letters.

On 24th September the advisory board considered defendant's exceptions to the report, and by resolution agreed to allow certain items which the plaintiff Unsworth indicated in red ink upon defendant's statement. These items amount to $387.04, including an item of $168 which the auditor had charged against defendant, made up of discounts which defendant allowed on taxes paid in the year 1897 after 15th December, the date fixed by by-law to which discount should be allowed.

This action was begun on 16th April, 1903, for the recovery of $2,137.27 alleged to be due from defendant to plaintiffs, and for an account of all moneys received or which should have been received by defendant, and for all moneys improperly disbursed by him as receiver.

G. D. Minty, for plaintiffs.

D. H. Laird, for defendant.

MATHERS, J.:—The statement of claim contains a great many charges of improper and fraudulent conduct on the part of defendant, but the evidence at the trial was confined entirely to seeking to establish the liability of the defendant for interest which he paid upon overdraft at the bank in excess of that which would have been payable if he had from time to time deposited the cash received, promptly after receiving same; and for the sum of $168 which he had allowed as discount on taxes in the year 1897 before referred to.

It appeared that the items making up the sum of $447.20 taxes dropped from the tax roll and charged against the defendant by the auditor were re-inserted upon the roll by Mr. Unsworth; that before this action began a considerable amount of this money had been collected, and that at the

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present time it is either all collected or remains a charge upon the property in favour of the plaintiffs. I cannot find that any of these items were omitted from the roll by defendant in bad faith. Even if the town suffered a loss because of the omission of these taxes from the roll, defendant would not be liable if the omission took place through error or was not due to bad faith or dishonesty: Peterborough v. Edwards, 31 C. P. 231.

The by-law providing for allowing a discount for prompt payment of taxes in 1897, fixed 15th December as the date up to which such discount should be allowed. In previous years discount had been allowed up to 31st December. A great many of the taxpayers were under the impression that, as in former years, discount would be allowed to the end of the year, and consequently did not pay their taxes prior to the 15th. Defendant spoke to the municipal commissioner, and asked for his advice as to what he should do. He was told that, as he was on the ground, he was in the best position to know what was expedient, and to use his own discretion. Acting, as I have no doubt he believed, in the interest of the town, and with the sanction of the municipal commissioner, defendant allowed discounts up to 31st December. These discounts amounted to $168. The plaintiff Unsworth and the advisory board, with full knowledge of all the facts, ratified the allowance of these discounts. The auditor appointed by the government to audit defendant's accounts from year to year found no fault with this allowance. At the time these discounts were allowed defendant was vested with all the powers of the municipal corporation. The only body having any power over him was the provincial government. The member of the government charged with supervision of municipal matters was the municipal commissioner. The discounts were allowed only after he had sanctioned that course being pursued. Under these circumstances, it seems to me it would be highly inequitable and unjust to charge defendant with these discounts because their allowance was not authorized by by-law. Had the necessity of a by-law occurred to defendant, or municipal commissioner, I have no doubt it would have been recommended and received the sanction of the Governor in council. It seems to me that plaintiffs are estopped from now asserting this claim. I adopt the language of the Supreme Court of Illinois in Martel v. East St. Louis, 94 Ill. 70, where it is said that "any

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positive acts of the municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel."

The chief claim put forward my plaintiffs at the trial was for an account of the interest which defendant, while receiver, paid to the bank upon overdraft, in excess of the amount which it would have been necessary to pay if the cash had been deposited promptly.

The defendant was secretary-treasurer of the school board, as well as receiver of the town, and he opened in McArthur's private bank in 1894 an account for both institutions. At that time no other bank would accept the accounts, and, when it became necessary to borrow money for the purposes of the town and school board, defendant had to personally guarantee repayment of the moneys so borrowed. Commencing with the year 1897 there were overdrafts in both accounts, which continued for varying amounts until defendant's resignation in February, 1901. Whilst it is quite apparent that for a considerable portion of this period there would still have been a large overdraft in both accounts, even if all the cash on hand had been deposited, it is equally apparent that at times the overdraft was considerably larger than it should have been.

The question of whether or not defendant is liable for failure to deposit the cash on hand more promptly than he did is by no means free from difficulty. If the position of defendant is that of an ordinary trustee, there would be no question, I think, about his liability. A trustee must not hold money in his hand available for payment of debts and allow interest bearing debts to remain unpaid: Lewin on Trusts, p. 389. But is the defendant in the position of an ordinary trustee? He is called a receiver, but he is clearly not a receiver in the ordinary sense. He is appointed to take the place of the municipal council of the town, with all the powers and authority of the council and of the clerk, treasurer, assessor, collector, and Court of Revision, under the Municipal Acts and Assessment Acts then in force. If defendant is a trustee at all, he can only, it seems to me, be such in the sense that these public officials are trustees.

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But, whether the liability of the defendant be that of a public official or that of an ordinary trustee, in the view I take of the evidence it is not necessary to inquire.

In 1898 it appears that sums aggregating $599.50 were drawn from the town bank account and not entered in the cash book. No vouchers shewing what these payments were for are found amongst the vouchers for that year. It was suggested that the vouchers have been lost, but all the vouchers for 1898 numbered by defendant consecutively are produced. Defendant was able to explain only one item going to make up this sum of $599.50. It was shewn that one item of $14.70 was a premium for insurance on one of the town buildings that Mr. McArthur had charged against the town account. I think I must hold, on the evidence, that the balance $584.80 was drawn by defendant and used temporarily for his own private purposes.

During all the year 1898 there was an overdraft in the town account, and the sums so drawn from time to time went to increase it. It does not require any authority to establish that for the interest so lost to the town defendant should be held responsible. If defendant drew moneys from the bank for his own purposes, a suspicion is raised that he would make use of the moneys in his own hands in the same way. Defendant says that he did not use the moneys in his hands for his own purposes. For a portion of the time at least during which he was receiver, he mixed his own moneys with the town moneys, and he may not always have nicely discriminated between what were his own moneys and what the town moneys. Although on the whole I think the defendant discharged his duties well and faithfully, yet I think that in handling the town moneys in the way shewn he was guilty of such conduct as renders him liable to account for the interest which the town was compelled to pay because of his failure to, from time to time, promptly deposit the moneys in his hands.

There will, therefore, be a reference to the Master to take an account of what interest upon overdraft on the town account was paid by defendant over and above what would have been payable had the moneys on hand been deposited at the end of each week. I think defendant ought to have made deposits weekly, and the accounts should be taken upon that basis.

When defendant was dismissed from office, there was an overdraft in McArthur's bank of the sum of $343.95, which

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he as receiver had borrowed for school purposes. In order to borrow this money, he had to render himself personally liable. The incoming receiver, most unjustifiably in my opinion, refused to pay this overdraft, and defendant was compelled to pay it. While the defendant was receiver he collected $35 from Pembina, and expended the same in the purchase of fuel for the town. After his dismissal he again paid this sum to the new receiver by mistake. I think defendant is entitled to recover these two sums, amounting in all to $378.95, against the town, and there will be judgment accordingly upon the counterclaim. The defendant also claimed $41.66 for taxes paid under protest, but there was no evidence on which I could find that these taxes were not properly paid.

As to costs, I think there should be no costs to plaintiffs up to and including the trial. The plaintiffs filed a statement of claim making a great many serious and damaging allegations against defendant, in support of which not a tittle of evidence was offered at the trial. It is the policy of the Court to discourage the making of unfounded allegations derogatory to character, by the refusal of costs, although the party making them is partly successful. This, I think, is a case where the rules should be applied to the plaintiffs.

I reserve the costs of the reference and of counterclaim, as well as further directions, until after the Master's report.

MANITOBA.

MARCH 9TH, 1907.

COURT OF APPEAL.

GRIFFITHS v. WINNIPEG ELECTRIC R. W. CO.

Jury—Application for Order Directing Trial by Jury—Onus—Action for Personal Injuries—Discretion—Appeal.

Appeal by defendants from order of MATHERS, J., ante 149, directing that the action be tried with a jury.

The appeal was heard by HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.

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J. A. M. Aikins, K.C., and D. H. Laird, for defendants.
W. Monahan, for plaintiff.

HOWELL, C.J.A.:—In 1895 the Queen's Bench Act was passed in this province, establishing an entirely new procedure in the Courts, and was in the nature of a code of the practice of law. It seems to me this statute should be construed according to the rules laid down by Lord Herschell in Bank of England v. Vagliano, [1891] A. C. at p. 144. He uses the following language: "I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

This statute is now the present King's Bench Act, R. S. M. 1902 ch. 40, and the parts of it which in this case require consideration are secs. 59 and 60. Section 59 is in the following language: "Actions for libel, slander, breach of promise of marriage, illegal or excessive distress, illegal or excessive seizure, criminal conversation, seduction, malicious arrest, malicious prosecution, false imprisonment, breach of warranty, and for the recovery of damages under the Workmen's Compensation for Injuries Act, shall be tried by jury, unless the parties in person or by their solicitors or counsel expressly waive such trial." And subsec. (b) of this section is as follows: "(b) Subject to the provisions of this section, all actions, causes, matters, and issues shall be tried by a Judge without a jury, unless otherwise ordered by a Judge."

If one were untrammelled by decisions and applied the rules which Lord Herschell laid down, it seems to me this section and sub-section could be paraphrased as follows: All actions referred to in that section shall be tried by a jury, and a Judge shall have no power to order the contrary. In all other cases a Judge shall have the power to order a case to be tried by a jury, and in default of his order they shall be tried by a Judge.

And sec. 60 provides that in any case which comes up for trial before a Judge without a jury, he shall have

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full power, in his discretion, to direct that the action or issues shall be tried or the damages assessed by a jury.

If the above is the proper construction of these sections, then eleven of the torts specially mentioned in sec. 59, together with all cases which may arise under the Workmen's Compensation Act (and these of course must all be torts), and two actions on contract, namely, breach of promise of marriage and breach of warranty, shall be tried by a jury, and in all other cases a Judge has a discretion, either before, at, or during the trial, to order that a case be tried by a jury.

If the two cases in contract above mentioned are critically examined, it is not too much to say that one, at least, is tortious in its nature, and in the other the damages at best must be "lumped" much as in the case before us.

At this stage it is well to consider what the power of the Judge is under sub-sec. (b). His power in sec. 60 is called by the statute discretionary, and the numerous English cases cited on the argument would certainly indicate that his power under sub-sec. (b) is also a discretionary power, and it seems to me that it does come within that class of cases which are subject to appeal, but which discretionary power is rarely in a court of appeal disturbed. The statute covers a very wide field of torts, and has declared that a jury is the proper tribunal before which such actions should be brought, and has to that extent laid down the policy of the law. If in an action an application is made to a Judge for trial by jury, one would think that the learned Judge would look at 59 first to gather the intention of the legislature in enacting this law and to get its policy, and, if the case was one akin to or within the general principles of those referred to in sec. 59, it seems to me he would conclude that the policy of the law was that such a case should be tried by a jury, and he would call upon the opposing party to shew why it should not be so tried. Sub-section (b) giving the Judge a discretion must be given some meaning. It was surely not put there for ornament, but if Mr. Aikins's argument is carried out to its logical conclusion, I can conceive of no case where the Judge should or could exercise any discretion under that clause. He argues that the party applying for a jury should make out a case for the application of that discretion, and I gather from his argument that he must produce evidence to shew that. In other words, to get affidavits to shew that the trial Judge is not as competent

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to try the case as the jury. It seems to me, if the nature of the case can be gathered from the pleadings, the learned Judge has the material upon which he can see whether the case is one which will be largely a matter of evidence and will be disposed of by a finding of fact, and can see whether the issues to be tried and the damages to be assessed are of the nature of those set forth in sec. 59.

One case has already been decided in this province upon this statute, namely, Bergman v. Smith, 11 Man. L. R. 364. That was a decision of Chief Justice Taylor. His attention does not seem to have been called to the wide difference between the present statute and the statutes under which the other Manitoba cases referred to in his judgment were decided. The case before him was an action of contract on the part of the plaintiff, and the defendant by way of counterclaim set up a breach of warranty, and desired to have damages claimed under the alleged breach set off against the plaintiff's claim. The defendant in that case as to his counterclaim was in the position of a plaintiff. If he had not set up that defence, he could have brought a separate action himself against the plaintiff, and would have been entitled by right to a jury. The defendant's right was completely within sec. 59, but the learned Judge took the view that because the applicant was not a plaintiff claiming under breach of warranty he would not exercise his discretion. If he were a plaintiff, no discretion was necessary; the Judge would have no power to try it otherwise than by a jury. I think in that case the Judge should have called upon the plaintiff to shew why he should not exercise his discretion, instead of throwing it upon the defendant.

Two cases in Ontario were cited to us where many years ago the Referee in Chambers had laid down the proposition that actions against corporations should not be tried by a jury. A glance at the Ontario Reports will shew that this law has never been followed there. Numerous cases since then against railways, street railways, and other corporations, have been tried by jury, and that is the ordinary way in which cases of that nature are tried in Ontario, and in every other part of the British Empire and in every other place where the English language is spoken and English laws prevail, except only Manitoba. A glance at the cases referred to in sec. 59 will shew that the legislature did not pick out and select the cases to be tried by jury because they were questions merely of fact, for instance, in a case of mali-

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cious prosecution there are interwoven questions of law and fact, and I know of no action of tort wherein the duties of a Judge and jury are more complicated than in such a case, and yet that action must be tried by a jury. In cases of excessive or illegal distress as well as those of malicious arrest, questions of law and fact are complicated in such a way that it is often difficult to decide which is the province of the Judge and which of the jury, yet they too must be tried by a jury. If, in this case, the plaintiff, instead of being a stranger to the company, had been a workman doing something to the rails and he was run over, the matter must be tried by a jury. On what principle then should this case not be tried by a jury? If a Judge tried this case and found the company liable, I would not envy his position in endeavouring to guess at the damages which a youth of 17 is to get for passing the remainder of his life with but one arm. How can a Judge arrive by any logical means at the financial injury the plaintiff will, in the future, sustain thereby, and how much is to be allowed him for passing the rest of his lifetime maimed and crippled?

In England the cases relegated to the common law side are tried by jury at the option of either party, but in the Chancery Division the provision as to trials is as follows:— "Causes or matters assigned by the principal Act to the Chancery Division shall be tried by Judge without a jury unless the Court or a Judge shall otherwise order." But, notwithstanding this provision, a glance over the cases cited shews that actions in the nature of torts are commonly referred to a jury, especially if a view is required or if there is a disputed boundary or conflicting evidence or a difficult assessment of damages.

Upon an examination of the cases in the Chancery Division where a jury has been ordered, and after again reading the remarks of Sir Arthur Kekewich in Jenkins v. Jackson, 40 Ch. D. at p. 73, I have no doubt that if this case had been brought in the Chancery Division in England, notwithstanding the restrictive Rule there, a jury would have been ordered.

I have again carefully examined Morrison v. Robinson, 8 Man. L. R. 218; Case v. Laird, ib. 461; Harvie v. Snowden, 9 Man. L. R. 313; and Woollacott v. Winnipeg Electric Street R. W. Co., 10 Man. L. R. 482; and have fully and thoughtfully considered them. When these cases were decided, the only cases which by statute must be tried by a jury were libel and slander. The first of these cases, it

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seems to me, should be tried by a Judge, and the issues in the second one do not appear, nor is the character of the case set forth, in the report, and the legislature has, by putting actions for malicious prosecution amongst those that must be tried by a jury, expressed its dissent from the decision in the third case.

The statute then in force was not more restrictive as to trials by jury than the Rule on this subject controlling trials in the Chancery Division in England above set out, and yet under that Rule, although the Chancery Judges were, as pointed out by Lindley, L.J., in Jenkins v. Bushby, [1891] 1 Ch. 491, unaccustomed to trials by jury and underrated their value, actions really of tort were commonly sent to a jury. Indeed the only case I have seen in England where the discretion of the Judge as to the mode of trial was reversed in appeal was where a jury was refused, and it does seem to me, with great deference, that the effect of these cases could scarcely have been considered in Woollacott v. Winnipeg Electric Street R. W. Co., above referred to.

There are two reasons why I need not follow that decision: in the first place, it was an appeal from a Judge who had exercised a discretion, and the Court might on that ground refuse to interfere; and in the second place, the statutes under which that case was decided are quite different from the law now in force.

Many remarks of Judges both in England and Canada were cited shewing the prejudice that juries have against corporations, but in both these countries actions such as this are still almost invariably tried by juries. Remarks of many statesmen and jurists could be quoted shewing how the country is indebted to juries in keeping powerful corporations within the law, but no good purpose can be served by repeating them.

I think the learned Judge, in making the order appealed against, exercised a sound discretion.

I would dismiss the appeal with costs.

RICHARDS, J.A.:—Section 59 of the King's Bench Act provides that 12 kinds of actions of tort and 2 of contract shall be tried by a jury, unless the parties waive such trial, and in sub-sec. (b) says: "Subject to the provisions of this section, all actions, causes, matters, and issues shall be tried by a Judge without a jury, unless otherwise ordered by a Judge."

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If language has any meaning, the words "unless otherwise ordered by a Judge" imply that there will be actions, other than those specified in the main part of the section, which should properly be tried by a jury, and that the legislature, while not specifying such other actions, has intrusted it to the discretion of a Judge to decide, in any case where a jury trial is applied for, whether, in his opinion, it is a proper case to be so tried.

In this case the learned Judge whose decision is appealed from has exercised that discretion, and the onus is on the defendants to shew that he has exercised it improperly.

If it were not for the decisions in Morrison v. Robinson, 8 Man. L. R. 218; Case v. Laird, ib. 461; Harvie v. Snowden, 9 Man. L. R. 313; Woollacott v. Winnipeg Electric Street R. W. Co., 10 Man. L. R. 483; and Bergman v. Smith, 11 Man. L. R. 364: the defendants' contention would not seem to me to be arguable. But I think that reasons can be shewn why none of those decisions is applicable to the present case.

In Morrison v. Robinson the issue was one of breach of contract, and I am not prepared to differ from the decision there given, that, in such a case, a mere preference by one of the parties for trial by a jury is not a ground for ordering such a trial.

In Case v. Laird neither the pleadings nor the facts of the case are stated. The report, therefore, proves nothing more than that, under some, to us unknown, circumstances, a Judge refused to order a trial by jury. There are many cases where such a decision would be the proper one.

In Harvie v. Snowden the present Chief Justice of the Court of King's Bench held that, unless there were complicated questions of fact or special circumstances to be investigated, which would render the issue more properly triable by a jury, trial by jury should be confined to those specified cases in which the statute stated that they should be so tried.

In Woollacott v. Winnipeg Electric Street R. W. Co. the facts were very like those in the present case, and the Court of King's Bench in banc upheld an order of the same learned Judge refusing an application for a jury. It must be borne in mind that, when the above cases were decided, the only cases that the statute said must be triable by jury were actions of libel and slander; but, since those decisions, a

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large number of actions of tort, and even two actions of contract, have been added to the list so triable, shewing so great a broadening of the principle of trial by jury as to greatly weaken, as authorities, cases decided prior to such enlargement of the number.

In Bergman v. Smith the plaintiff claimed payment for professional services, and the defendant counterclaimed for breach of warranty. Taylor C.J., held that, though the statute then provided that actions for breach of warranty were to be tried by jury, a counterclaim was not an "action," and therefore the defendant was not entitled, as of right, to a trial by jury, and, further, that there was no ground shewn for the exercise by him of the discretionary power to order a trial by jury.

It is not necessary to discuss here the learned Chief Justice's finding that a counterclaim is not an "action" within the meaning of sec. 59, as that point is not now in question; but it may be pointed out here that he seems to have considered that point to be the chief question before him. His holding that, if it was not obligatory on him to do so, he would not order the trial to be by jury, was the exercise of his discretion. He could have exercised it the other way and ordered a jury; but, in either case, Judges sitting in appeal from his order would find it difficult to say that the discretion given him by the Act was not properly exercised.

While the specified cases that the legislature said were to be tried by jury were only those of libel and slander, no other cases could arise as to which it could be argued that they were similar in nature to those so specified; but the present action is not so restricted. Amongst the cases where a jury trial is now had as to right, is that of an action for recovery of damages under the Workmen's Compensation for Injuries Act. If the plaintiff in the present action had been a servant of the defendants and acting in their employ when injured, and the facts had otherwise been the same, he would have had the right to a trial by jury. I can see no reason why a jury can not as properly try a case where the plaintiff was not at the time of the injury an employee of the defendants as they can a case where he was—the facts being otherwise the same. Yet, if we are going to give force to the defendants' contention, we must hold that a jury can in this case not properly try issues which, if the plaintiff had been defendants' servant, it would by legislative enactment be compulsory to so try.

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I think, too, that, when Harvie v. Snowden and Woollacott v. Winnipeg Electric Street R. W. Co. were decided, the learned Judges were not so familiar as we now are with the difficulty a Judge meets in trying to logically measure damages in many actions of tort.

It seems to me that, as this is the first case where our Court in banc has upheld an order for trial by jury, we should proceed cautiously. It should be understood, I think, that we do not attempt to define the dividing line between cases where a Judge, in exercising the discretion, should allow a jury, and those where he should not, but that we merely hold that, in this present case, the discretion has not been improperly exercised.

I would dismiss the appeal with costs.

PERDUE, J.A.:—This is an action for damages caused to plaintiff by the alleged negligence of defendants by reason of which plaintiff was run over by a street car belonging to defendants and his arm cut off.

Upon an application by the plaintiff to Mathers, J., in Chambers, under sec. 59 of the King's Bench Act, an order was made that the issues in the action be tried by a jury. From that order the present appeal is brought.

Defendants in support of their appeal cited 5 decisions of the Court of Queen's Bench for this province, in all of which a jury was refused. In the earliest of these, Morrison v. Robinson, 8 Man. L. R. 218, Killam, J., refused the order on the ground that nothing was shewn in support of the application except the defendant's wish for a trial by jury. The action was apparently founded on breach of contract, and the damages to be recovered depended on a computation of figures.

The next decision, Case v. Laird, 8 Man. L. R. 461, simply enunciates the obvious principle that the onus of shewing that the case is one to be tried with a jury rests upon the party applying. The report does not state the nature of the action, and there is little to be gleaned from it that will assist us in the present appeal.

In Harvie v. Snowden, 9 Man. L. R. 313, a jury was refused, in an action for malicious prosecution, on the ground that the facts involved did not appear to be particularly complicated or to offer special difficulty. But shortly afterwards the legislature placed malicious prosecution in the list

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of actions which shall be tried by a jury unless it is waived by the parties.

The next case, Woollacott v. Winnipeg Electric Street R. W. Co., 10 Man. L. R. 482, is one closely resembling the present, but with this important difference, that it was an appeal to the full Court from a decision of a single Judge, in which he had exercised the discretion conferred on him by the statute.

The latest reported decision is that of Bergman v. Smith, 11 Man. L. R. 364. That case was decided under the statute as now framed. The plaintiff sued for fees for professional services, and defendant counterclaimed for a breach of warranty. Under sec. 59 of the Queen's Bench Act, then in force, breach of warranty is one of the actions which is to be tried by jury. The defendant moved to have the case so tried, but Taylor, C.J., held that the adding of a counterclaim by the defendant for breach of warranty did not make the action one of breach of warranty. The decision has no bearing, in my opinion, upon the present case.

When the Woollacott case was decided, the only actions in which trial by jury was compulsory were libel and slander. Since that decision a number of actions of tort and two arising out of breach of contract have been added by the legislature to the list of actions to be tried by jury: sec. 59, King's Bench Act, R. S. M. 1902 ch. 40. This seems to indicate a trend in the legislation towards a wider application of the principle of trial by jury. This may have arisen from the fact that for many years a tendency had been shewn on the part of the Judges to exercise their discretion along the line of refusing a jury in practically all cases where an application was necessary.

In the Woollacott case the Court refused to interfere with the discretion which the Judge appealed from had exercised. They approved of the disposal he had made of the application under the facts and circumstances of that particular case. Beyond that point the decision should not be extended as a precedent. Each application under sec. 59, sub-sec. (b), must be considered with reference to the nature of the action, the issues raised in the pleadings, the nature of the evidence, the damages to be assessed—with reference, in fact, to all the peculiar features of the action. Each case must be considered upon its own merits. Where a Judge has a discretion conferred upon him as to granting or refusing a jury, the Court should not interfere with the

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manner in which he has exercised that discretion unless it is essential to justice to do so: Mangan v. Metropolitan Electric Supply Co., [1891] 2 Ch. 551; Jenkins v. Bushby, [1891] 1 Ch. 484; Thornton v. Union Discount Co., 7 Times L. R. 410.

The learned Judge has fully set out the considerations which influenced him in arriving at the conclusion that the case was one to be tried with a jury. This case is similar in nature to at least one class of actions which by sec. 59 shall be tried by jury, unless that mode of trial is waived. In directing that the present case should be tried in the manner in which similar actions had almost invariably been tried prior to 1891, and in which they are tried in England at the present time, the Judge cannot be said to have done any injustice to defendants. The trial will involve findings of fact, and damages for bodily injury may have to be assessed. These are essentially within the province of a jury. That questions of law will be involved is not, it appears to me, a reason for refusing a jury. The Judge can deal with the questions of law, leaving it to the jury to find facts and assess damages. The case does not include more difficult or intricate questions of law and fact than we may expect to find in many of the actions which are specially assigned by the statute to be tried with a jury.

I think the appeal should be dismissed with costs.

MANITOBA.

MARCH 9TH, 1907.

COURT OF APPEAL.

MOORE v. SCOTT.

Promissory Note — Interest Payable by Instalments before Date for Payment of Principal—Indorsement to Plaintiff after one Instalment Due and Unpaid — Notice of Dishonour—Not Holder in Due Course—Note Obtained by Fraud—Sale of Horse—Election to Rescind—Offer of Restitution—Pleading—Amendment of Defence of Fraud.

Appeal by plaintiff from judgment of MATHERS, J., ante 8.

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The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

J. A. M. Aikins, K.C., and J. F. Fisher, for plaintiff.

A. J. Andrews and H. A. Burbidge, for defendants.

HOWELL, C.J.A.:—The trial Judge has found, as a fact, that the issue of the promissory note in this suit was affected with fraud, and I see nothing in the evidence that would justify the reversal of that finding. If defendants are in a position to rescind the contract, and have done so, it follows that the burden of proof that plaintiff is a holder in due course is upon him. He must at the trial affirmatively prove: (1) that he became the holder of it before it was overdue; (2) that he at that time had no notice that the note had previously been dishonoured; (3) that he took the note in good faith and for value; (4) that at the time he took the note he had no notice of the defect in the title of the payee (that is, that McLaughlin Bros. obtained the bill through fraud).

The note sued on is as follows:

"$1,166.66/100 Swan Lake, Man., Oct. 22, 1902.

"On Dec. 1, 1904, after date, for value received, we jointly and severally promise to pay McLaughlin Bros., or order, eleven hundred and sixty-six and 66/100 dollars, at the Union Bank of Canada, Winnipeg, Man., with interest at seven per cent. per annum, interest payable annually."

The transfer or pledge is by writing, the form of which is set forth in the judgment of my brother Phippen, which I have had the opportunity of reading. From the habit which McLaughlin Bros. have had in the past of endeavouring to protect their fraudulent transactions by the aid of "a holder in due course," as shewn in various cases which have heretofore come before this Court, and for the reasons set forth in Mr. Justice Phippen's judgment, one must be full of suspicion as to the genuineness and innocence of plaintiff and full of doubt whether in this case McLaughlin Bros. are not the real plaintiffs.

However, I propose to base my judgment upon the point taken by the trial Judge.

It has been strenuously argued that defendants knew, or ought to have known, long before the death of the horse, that they had been defrauded, and that because they did not disaffirm the contract and return the horse to McLaughlin Bros.

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before it died they have no defence against plaintiff. Plaintiff does not pretend that he has in any way been injured by this delay. He has only to call upon McLaughlin Bros. for his money and he will get it, according to his own evidence. The statute says that the onus is upon the plaintiff, "if, in an action on a bill, it is admitted or proved that the . . . issue . . . of the bill is affected with fraud;" and it might well be argued that, in a case like this where the plaintiff is not himself entitled to a return of the goods, and where the defendant sets up fraud and proves it, it would be on the plaintiff to shew that because of the non-return of the goods after the discovery of the fraud the defendant has elected to abandon this defence and rely upon a new contract.

I should not be astute to find in favour of a fraudulent party to a contract, on the ground that the party defrauded had not hastily returned the goods to the party who defrauded him, from any desire to protect the pocket of the guilty party.

Messrs. McLaughlin Bros., who live in the United States, were served with a third party notice in this case, but chose not to appear or give evidence.

The sale of the horse was to all the defendants, and all must unite in rescinding the contract and in returning the horse, and before taking such a serious and expensive step they must all be reasonably certain of their ground.

When a party has been defrauded, he may declare the contract void, or he may elect to continue the contract, retain the goods, and rely on other remedies for his wrongs, but he is not bound to elect at once; "he may wait and think which way he will exercise his election so long as he can do so without injuring other persons:" Scarf v. Jardine, 7 App. Cas. 360.

In Clough v. London and North Western R. W. Co., L. R. 7 Ex. 34, the goods were repossessed by the defendants on a ground untenable, and after suit brought the defendants found that there had been fraud in the original transaction, and they then claimed the right to rescind and to return the money and asserted title to the goods in this way successfully.

In Doyle v. Diamond Flint Glass Co., 10 O. L. R. 567, 6 O. W. R. 207, commencing an action was held to be evidence of election to rescind, and the money, the subject matter of the fraudulent contract, was allowed to be brought into Court long after action brought.

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The trial Judge has found, as a fact, that defendants did not discover the full fraud perpetrated upon them until after the horse died. He saw the witnesses and found the fact that defendants had not elected to affirm the fraudulent contract, and I see no good reason to reverse this finding, especially as McLaughlin Bros. chose not to intervene. When the horse died, there was nothing to return; leaving his bones to bleach on the prairies would not harm McLaughlin Bros. more than returning the carcass to them: Adam v. Newbigging, 13 App. Cas. 308.

Defendants rescinded the contract with their plea, and it is now for plaintiff to shew affirmatively that he is a holder in due course.

By the terms of payment of the note, the interest is payable by instalments, and one instalment of interest amounting to over $80 was long overdue when plaintiff became the holder, and another instalment of like amount fell due a few days after the note came into his possession. About one month after plaintiff became holder, he forwarded the note to Canada for collection, and claimed payment of all this interest.

It is fair to assume by his acts that he knew the overdue instalment of interest was in arrear when he became the holder; at all events the onus was on him to prove want of knowledge of dishonour.

The interest is a part of the contract, and a part of the contract was dishonoured before he became the holder. An instalment of the note was overdue. The makers of the note had defaulted, and he must have known it. If the instalment were principal it must be presented and notice given to hold the indorser: Oridge v. Sherborne, 11 M. & W. 378.

The law merchant gives the holder in due course a better title and higher rights than at common law the payee of a note has, but to get that right the note must not be overdue. Why is this? It is because an overdue note raises suspicion that the payee cannot enforce payment. Default in payment of an instalment, whether of principal or interest, must to my mind raise the same suspicion.

Again, if there had been a dishonour of the bill, as by refusal to accept, and the plaintiff knew of it, he is not a holder in due course. This note had, to my mind, been dishonoured, and the plaintiff has not shewn he did not know it. There are strong presumptions that he did know it.

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There are many American cases on the subject of an overdue instalment of interest on a note, some deciding one way and some the other, the majority of them holding that interest is a mere incident to a note, and that non-payment of an instalment of interest is not a dishonour of the note.

The leading American case supporting that view is National Bank v. Kirby, 108 Mass. 497, and I gather from reading the judgment that the conclusion is arrived at because of prior American decisions which have drifted the American law away from the English law. The learned Judge in that case says, amongst other things: "Interest is not recovered on overdue interest, and the Statute of Limitations does not run against it until the principal is due."

This is probably American law, but it is not the English law. In Dickenson v. Harrison, 4 Price 282, and Atwood v. Taylor, 1 M. & G. 760, it was held that where principal and interest are by contract made payable the same day, there is a separate action for each, and that either can be sued for alone. Can it be doubted for a moment that the instalment of interest on the note in question could have been sued for when it fell due? If so, the statute commenced running when it fell due. As well might it be argued that an instalment of interest in a mortgage of real estate could not be sued for, and that the Statute of Limitations did not apply to it. See Manitoba Mortgage Co. v. Daly, 10 Man. L. R. 425; McFadden v. Brandon, 8 O. L. R. 610, 4 O. W. R. 349.

Subsequently National Bank v. Kirby was approved of by Cromwell v. County of Sac, 96 U. S. R. 51. That case also shews how widely the American differs from the English law on this subject. In speaking of the rights of a holder in due course the learned Judge uses the following language: "Mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part."

This cannot be the law under the English and Canadian codes. The action in which this language was used arose from an overdue interest coupon to a municipal bond, and the learned Judge applied, as a matter of course, to that case, the law relating to bills of exchange and promissory notes, shewing again how widely the law on this subject differs in the two countries.

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The only English or Canadian law on this subject that I have been directed to is Jennings v. Napanee Brush Co., 4 C. L. T. 595, a decision of the County Court Judge in Toronto, and this case the trial Judge followed.

I think plaintiff became the holder of the note after it was due within the meaning of the Code, and also that it had been dishonoured before he became holder, and he has not shewn that he did not then have notice of it.

I have read the judgment of my brother Richards, but have not considered that aspect of the defence, being satisfied that defendant should succeed on the line of law adopted by the trial Judge.

RICHARDS, J.A.:—The evidence shews that the McLaughlins' agent agreed to sell to defendants a certain young pedigreed Percheron stallion, and that, by fraudulently representing to defendants that an old stallion, which the agent delivered to defendants, was that young pedigreed stallion, he procured defendants to give the note sued on, in part payment for it. That being the case, it seems to me that the issue of the note is affected with fraud within the meaning of sub-sec. 2 of sec. 58 of ch. 119 of R. S. C. 1906, and the burden is on plaintiff to prove that he is the holder of the note in due course.

I agree with the finding of the trial Judge that the death of the horse occurred before defendants had such reasonably certain knowledge of the fraud as would put them to their election, whether to keep or to return the horse, and that they, therefore, are not to be held as having condoned the fraud.

The trial Judge held that, as there was interest overdue on the note when the plaintiff received it from the McLaughlins, the note was so far overdue as to disentitle plaintiff to say that he is a holder in due course. It does not seem to me necessary to now decide that point. The note was taken by plaintiff, on his own shewing, as collateral security to a note at 4 months for $2.500 made by the McLaughlins and discounted by plaintiff. The last named note was renewed several times, and at the time of the making of the last renewal before this action was brought, the note made by defendants, and now sued on, was overdue as to its principal.

Plaintiff, at the time of each renewal, apparently gave up the renewed note to the McLaughlins, and took from them

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a new pledge of the collateral. At least, that is the view I take of the evidence. If I am right in that, plaintiff, when he brought this action, was not the holder in due course, but was and is merely in the position the McLaughlins would be in, if they still held the note. If they held it, they would be debarred by the fraud through which the note was obtained, from recovering on it.

I may add that, in addition to the above, I take the view held, as I understand, by my brother Phippen, that the evidence supports the contention that plaintiff is not suing in his own right, but merely as a shield for the McLaughlins, to enable them to evade the defence of fraud that defendants could rely on if the McLaughlins had sued in their own name.

I would dismiss the appeal with costs.

PERDUE, J.A.:—This is an action by an indorsee against the makers of a promissory note.

The facts involved are fully set out in the judgment appealed from.

One of the findings of the trial Judge was that plaintiff was not a holder in due course, and we are asked to reverse that finding.

The note was dated 22nd October, 1902, was payable on 1st December, 1904, and bore interest at 7 per cent. per annum, payable annually. Plaintiff acquired the note on 18th October, 1904. There was, therefore, a year's interest nearly a year overdue and unpaid when it was negotiated. Upon the face of the note there is a memorandum in red ink shewing the amount of interest due upon the note, and this includes interest from the date of the note. It is not shewn when this memorandum was put on the note, but plaintiff claims and sues for the full amount of interest. In the absence of proof to the contrary, it may, therefore, be assumed that plaintiff was aware when he took the note that there was a year's interest then long in arrear. The question then arises, can plaintiff, under these circumstances, avail himself of the provision in the statute protecting a holder in due course?

In the case of Oridge v. Sherborne, 11 M. & W. 374, decided in 1843, it was held that a promissory note in which the principal was payable by instalments was a valid note, and that the maker was entitled to three days' grace upon each instalment. The action was one brought by the indorsee

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against the payee to recover an instalment due upon a note payable by instalments. The usual three days' grace were allowed, and notice of dishonour was given on the fourth day. The plaintiff obtained a verdict, and this was upheld upon appeal. The result of this decision is embodied in sec. 9 of the Bills of Exchange Act. That section provides that the sum payable under the note may be made payable by stated instalments.

In the present case the principal is not made payable by stated instalments in direct terms, but two sums of money representing yearly interest on the principal at 7 per cent. are made "payable annually." The meaning of that expression must be that an instalment of interest is payable immediately upon the expiration of each year after the date of the note. Where a promissory note was made payable "in three annual instalments" it was held that this meant "three equal annual instalments," and these instalments were held to be payable in one, two, or three years from the date of the note: In re Babcock v. Ayers, 27 O. R. 47.

The amount of a year's interest on a stated sum of money at 7 per cent. per annum can at once be ascertained by simple calculation, and is as much a sum certain as if it were designated in actual numbers. Seven per cent. upon $1,000 for a year is practically as definite a sum as $70. If therefore in the present case the annual interest due upon the note had been calculated, and the amount of this made payable annually or at the end of each year, the instrument would have been a note securing money payable by stated instalments. That the sums payable before the final payment are expressed to be interest and are made the subject of calculation, does not, it appears to me, make any material difference.

In Jennings v. Napance Brush Co., 4 C. L. T. 595, a very carefully considered judgment was given by the late Judge McDougall of the County Court of York, Ont., in which this question was dealt with. He held that a promissory note payable 18 months after date with interest at 7 per cent. per annum, payable half yearly, required presentment of the note for each instalment of interest, and notice of dishonour, in order to hold the indorser. As pointed ont by that learned Judge, the American authorities are not in harmony with each other, and I have not been able to find any English or Canadian reports bearing on the question.

It was urged by Mr. Aikins that interest is a mere incident of the debt, and that sums accruing for interest cannot

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therefore be regarded as instalments making up the sum certain payable under the note. Interest is, no doubt, accessory to the principal, in the sense that only the holder of the note can recover the interest: Florence v. Drayson, 1 C. B. N. S. 584. But the cases relied on in support of the proposition stated by counsel seem to shew that, where interest is reserved by a contract, it forms a debt distinct from the principal, and may be recovered as a distinct and independent debt: Dickinson v. Harrison, 4 Price 282, at p. 287; Atwood v. Taylor, 1 M. & G. at p. 307. Suits to recover money due for interest under mortgages, where the principal is not sued for, are actions of frequent occurrence and well established.

It therefore appears to me that the note sued upon in this case was, to the knowledge of plaintiff, overdue in respect of a stated instalment of money payable under it at the time plaintiff acquired it, and that he cannot therefore be held to be a holder in due course under sec. 29 of the Bills of Exchange Act. The defences which might have been raised in an action by the payee are therefore available as against him.

The note sued upon was given in part payment for a Percheron stallion named Charlot, purchased by defendants from McLaughlin Bros. The horse purchased was a high priced animal, a designated individual horse of superior class and reputation, and bearing a registered name and pedigree. By a gross fraud, another animal of much greater age and much inferor in value was palmed upon defendants by the vendors. They, in point of fact, never received the article they purchased and for which the note was given. Although they had reason to suspect and did suspect that some imposition had been practised upon them, the full extent and actual nature of the fraud was not known to them until after the animal had died. When the actual nature of the deception had been learned and the proofs of it obtained, it was no longer possible to return the horse. The death of the horse before discovery of the fraud was an excuse for not returning it: Elphick v. Barnes, 5 C. P. D. 321; Head v. Tattersall, L. R. 7 Ex. 7.

The contract made between the parties was never completed. The defendants did not receive the horse they agreed to purchase. By a false and fraudulent representation, they were induced to receive a horse which was not the one they had agreed to take. The contract was not fulfilled by the

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vendors. The actual Charlot was not delivered. The acceptance by defendants of the false Charlot was not binding upon them unless they elected to retain it after they had knowledge of the true state of the facts. I think the note was obtained by fraud, and I cannot find upon the evidence that defendants waived the fraud after becoming aware of it If a horse they had not bought came to their hands and they retained and used it, they could only be liable upon a contract implied from these circumstances. But the note was not given for this, nor can such an implied contract, assuming its existence, operate as a consideration for a note previously given for a totally different purpose.

I think the judgment of Mathers, J., should be upheld and the appeal dismissed with costs.

PHIPPEN, J.A.:—Plaintiff, who is a private banker at St. Paul, Minn., brings this action as the holder of a promissory note for $1,166.66 made by defendants dated 27th October, 1902, payable on 1st December, 1904, with interest at 7 per cent. per annum, payable yearly. The note was given to McLaughlin Bros., who are horse dealers at Columbus, Ohio, in part payment for a stallion, and it was by them indorsed to and hypothecated with plaintiff in October, 1904, as one of several notes then given as security for a note of McLaughlin Bros. for $2,500, which plaintiff alleges he then discounted.

This $2,500 note was renewed from time to time. With each renewal a new hypothecation was given. The last renewal and hypothecation is dated 19th June, 1906, and is in the words and figures following:—

"$2,500. Merriam Park, St. Paul, Minn., June 19th, 1906.

"Four months (without grace) after date, for value received, we promise to pay to the order of the Bank of Merriam Park, Merriam Park, St. Paul, Minn., twenty-five hundred dollars, with interest at the rate of six per cent. per annum until paid, the interest to maturity at that rate having been paid in advance, and it being the intention that this note, if not paid at maturity, shall bear the same rate of interest thereafter as before, until paid, having deposited herewith (sundry notes). And we hereby give the said Bank of Merriam Park, or its assigns, full power and authority to sell said collateral security, or any other security which we may from time to time substitute therefor,

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or any portion thereof, at public or private sale, without advertising the same, or otherwise giving notice to . . on the maturity of this note or at any time thereafter; and to apply so much of the proceeds thereof, less all expenses, toward payment of this note, with interest thereon, or at discretion to collect or otherwise convert said securities, or either or any part of them, and apply the proceeds toward such payments; and in case the proceeds thereof shall not cover the principal, with interest and expenses incurred, we promise to pay the deficiency forthwith upon demand. Payable at Bank of Merriam Park.

No.

Due Oct. 19, 1906. McLaughlin Bros."

The hypothecations and notes except the last are not produced. Apparently each was surrendered to McLaughlin Bros., as and when a renewal was taken.

Referring to the original transaction in connection with which the note sued upon was given, the trial Judge has found as follows: "I am satisfied beyond all doubt that the horse sold to the defendants was not the horse Charlot named in the pedigree produced, but was an old horse not less than 13 years of age and probably more, and that this fact was well known to both Morris and McLaughlin Bros. when the sale was made. It is difficult to conceive a more gross or deliberate fraud than that which Morris perpetrated upon the defendants. But it is not the fraud of the agent alone. I am satisfied that the fraudulent scheme was concocted by McLaughlin Bros., and that Morris was their willing tool to carry the scheme into execution. What these people did was to take the real and true pedigree of the horse Charlot, a horse 6½ years old, and substitute an old horse, and by falsely and fraudulently representing that this old horse was the horse Charlot, induced these defendants to buy him at 3,500."

There would appear to be ample evidence to support this finding, and with it I entirely concur.

Defendants contend that plaintiff's title to the note depends on the hypothecation of 19th June, and he was not, therefore, the holder of the note when he commenced this action. If plaintiff did hold the note at the particular time the suit was started, it is argued that by the agreement of 19th June he surrendered the note to McLaughlin Bros. through accepting a new hypothecation, and in either event plaintiff's action must fail.

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With much hesitation I am unable to adopt this view. Plaintiff received the note in October, 1904. The effect of the several subsequent hypothecations must depend upon the intent of the parties. Taking plaintiff's examination as a whole, I am not satisfied that the parties contemplated more than keeping the discounted note current. The indebtedness appears to have been treated as continuing, and there does not seem to have been any alteration made in the nature of the securities. Plaintiff speaks of the several transactions following the original hypothecation as "renewals." In reason it would appear to be unexpected that a banker should surrender a note received before maturity, immediately retaking the same past due as security for the same indebtedness, thus without advantage to himself admitting the equities. It is true the hypothecation pledges the paper as security for "this note," but on the whole I am inclined to the opinion that the note sued on must be taken to be held by plaintiff as of October, 1904. I am probably more freely disposed to this view as I think the action can be disposed of upon other grounds.

Personally I am unable to credit plaintiff's story that the note was taken by him in good faith, in the ordinary course of his business. This was the first and practically the only transaction he has had with McLaughlins. McLaughlins' financial position is such as to enable plaintiff to have received payment of the advance at any time upon demand. His only ostensible interest in the transaction is 6 per cent. per annum. While taking the position that he does not wish to accept payment from the McLaughlins of money advanced so far back as October, 1904, and being entirely content with his securities, he has sued not only on the note in question, but on all other notes received as collateral, and that without any arrangement with the McLaughlins as to costs. In this particular suit he has deposited $600 as security for defendants' costs apart from anything he may have paid or any legal liability he may have incurred to his own solicitors and counsel. What liability he has incurred in the several other actions we are not informed. He has not even requested the McLaughlins, who he states are able to pay on demand, who are in such high financial standing that were the plaintiff now advancing them $2,500 he would do so freely without collateral; he has not even asked these men to provide any of the security, to pay interest on his disbursements, or to stand

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behind him in the event of loss. He incurs all these risks to keep current an advance of $2,500 at 6 per cent. simple interest; at the same time seeking, through contested suits brought in a foreign country, at personal inconvenience and risk as to costs, to recover money which he could have for the asking at home, from men with whom he has had but a slight and purely business connection.

Personally, as I say, I am unable to believe this story, preferring rather to accept the internal evidences as the real truth. To my mind the McLaughlins, with plaintiff's knowledge, placed the notes in his hands to enable him to sue after maturity as an apparent holder in good faith and thus to avoid the equities attaching between themselves and defendants. I hold that plaintiff took the note sued on under circumstances which amount to knowledge of this intention, and as trustee for the payees, and that he does not, therefore, bring himself within the statute as a bona fide holder for value. Having arrived at this conclusion, it is unnecessary to consider if the non-payment of an instalment of interest is such a default as to thereafter prevent the transfer of the note in due course.

As I fully agree with the findings of the trial Judge on the remaining points, I would dismiss the appeal with costs.

MANITOBA.

CUMBERLAND, Co.C.J. MARCH 22ND. 1894.

BRANDON COUNTY COURT.

ROSS v. GOODIER.

Attachment of Debts—Moneys Paid to Clerk of County Court in another Action—Not a Garnishable Debt—Assignment of Debt Attached—Validity.

Motion to set aside a garnishing order.

CUMBERLAND, Co.C.J.:—It appears that in 1892 Richard Goodier, the defendant in this suit, had a claim against

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two men named Martin, and, being unable to collect it, instructed his solicitor to put it in suit. This was done by a garnishee order and summons issued out of this Court, the Canadian Pacific Railway Company being made garnishees, and in course of time judgment was recovered against the defendants. The garnishees paid into Court some $75, the amount they admitted owing to the Martins, the payment being made in the usual way to W. J. Ferguson, the clerk of the Court. Ferguson shortly afterwards ceased to be clerk, and this money, or an equal amount, in some way, I presume, either directly from Ferguson, or perhaps under the provisions of sec. 50 of the County Courts Act, came into the possession and charge of Mr. Clement, who succeeded Ferguson as clerk. Subsequently and before the money had been paid out—in fact, so far as I can gather, before Goodier or his solicitor knew that it had been paid in by the railway company—this present suit was begun by a garnishee order and summons, and the money sought to be attached by making Mr. Clement, as clerk of the Court, garnishee.

A motion is now made calling on the plaintiff and garnishee to shew cause why the garnishing order should not be set aside, or why the money sought to be attached should not be paid over to D. Ricker and William Featherston, who claim under assignments from Goodier of the moneys coming to him from the Martins before the suit began. The motion is made on behalf of the defendant and also Ricker and Featherston. On the return of the summons, Mr. Clement attended and stated that since the commencement of this suit he had ceased to be clerk of this Court, and had no longer in his possession or charge these or any other Court moneys, but that Mr. Darrach, who was now the clerk, had charge of the same.

The grounds of the motion may, I think, be limited to three:—(1) The affidavit on which the garnishee order was obtained was defective in that it did not sufficiently state the nature of the plaintiff's cause of action. (2) Moneys in the hands or charge of a County Court clerk, as these were, are not attachable. (3) The moneys had before suit passed by assignment to Ricker and Featherston.

Section 245 of the County Courts Act provides that when any person (primary creditor) has a claim against another (primary debtor) for which suit may be entered or is pending under the County Courts Act, and any obligation or

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liability is due, owing, or payable, or is accruing, and will be due or payable from a third person (garnishee) to the primary debtor, the clerk of the County Court may issue a garnishee order and summons, upon the primary creditor, his agent or attorney, making and filing an affidavit in the form appropriate to the purpose in the schedule of forms to the Act. This form is No. 30, and the clause in it which is said not to have been complied with here, is the second, and its reads thus: "The said primary debtor is justly and truly indebted (or liable) to the primary creditor in the sum of .....for (here state shortly the cause of action in common, plain, and concise language)." The clause, as found in the affidavit made in this case, is as follows: "That the said primary debtor is justly and truly indebted to me in the sum of $48.27 for an account due Thompson and Ross at Nesbitt and assigned to me."

The words requiring the cause of action to be stated appear in the form in italics and in the shape of a parenthesis, but I see no sufficient reason for giving them a different meaning or effect from that which they would have had if, instead of being found in the schedule, they had appeared in the body of the Act itself: see Attorney-General v. Lamplough, 3 Ex. D. 214. This provision requiring a plain and concise statement of the cause of action is, so far as the language of the statute can make it, quite as imperative as are any of those forms in the Act respecting garnishment in the Queen's Bench, for instance, as those which make it necessary to shew that an action is pending, that the claim is due after making all just discounts, that the garnishee is within the jurisdiction, or that the plaintiff has reason to believe the garnishee indebted, or both, and one only requires to look at such cases as Shorey v. Baker, 1 Man. L. R. 282, Grant v. Kelly, 2 Man. L. R. 222, Nagengast v. Miller, 3 Man. L. R. 241, and French v. Martin, 8 Man. L. R. 362, to see how close a compliance with these provisions the Judges have held to be necessary.

Does the affidavit in this case state the cause of action in "clear and concise language"? In two cases at least it has been decided that affidavits giving much more information than is given here did not shew any cause of action at all. In Handley v. Franchi, L. R. 2 Ex. 34, it was held that an affidavit to hold to bail which stated simply that the defendant was "well and truly indebted" to the plaintiff "for money lent and goods sold and delivered," without

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averring either that the money was lent or the goods delivered by the plaintiff to the defendant, did not sufficiently shew a cause of action; and the decision was the same in the case of Diamond v. Cartwright, 22 C. P. 494, when the affidavit read as follows: "The defendant is justly and truly indebted to me (the plaintiff) in the sum of $259.90 for medicines, medical attendance and services, and money lent, a detailed account of which I have some months ago delivered or caused to be delivered to him." If these cases are to be followed (and the mere fact that they are capias cases is no reason why they should not), the affidavit in question here must clearly be held bad, but, assuming or admitting that a less technical method of stating the cause of action may be adopted, where it only requires to be stated "in common and plain language," I am of opinion that the wording used here falls short of the requirements of the statute. It seems to me it should certainly be full enough and explicit enough to fulfil two purposes: (1) to shew the defendant clearly what he is being sued for; and (2) to make it apparent that the cause of action is one in respect of which garnishee proceedings may be taken. To my mind this does not do either. It may perhaps in this particular case indicate to the defendant what the suit is about, but if it does it can only be because he owes or did owe Thompson and Ross of Nesbitt, one and only one debt and that of $48.27. This statement of the cause of action is certainly no better than it would be in a case where intermediates like Thompson and Ross did not come in, where the words "between," "due," and "me" were left out. The clause would then consist of a simple allegation that the defendant was indebted to the plaintiff in the sum of $48.27 for an account due him. If such an allegation gave any information to the defendant, it could, as I said before, only be because by accident there was only one claim to which it could refer. This, however, cannot be what is meant by stating the cause of action in "plain and concise language." There is, moreover, nothing in the affidavit to shew that the alleged cause of action is one "for which suit may be entered in the County Court." It is only where it is a claim of that kind that the right to take garnishee proceedings exists, and it seems to me that fact should not be left in doubt. So far as appears in the affidavit, the claim of $48.27 might be for a gambling debt, or for liquors drank in a tavern, for which a suit will not lie in this Court at all. For these reasons I think the first

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objection must prevail. I ought, perhaps, to refer to the case of Bryan v. Freeman, 7 Man. L. R. 57, which was a capias case, where a motion was made to set aside the arrest on various grounds. In the head-note the following appears: "The Court will not interfere on the ground of the cause of action being insufficiently stated, unless it is very clear that the plaintiff has no cause of action." I feel almost certain that the learned Judge who heard that motion did not lay down such a rule. What he probably did say was, that the Court hesitated to interfere when the ground urged for their interference was not that the cause of action was insufficiently stated, but that on all the material there was doubt about there being a cause of action at all. That is the doctrine laid down in the cases cited. And it was what was held by the learned Judge himself in Anderson v. Johnson, 6 Man. L. R. 113, when he discussed the question fully.

The next objection taken was that moneys such as those in question here are not garnishable. There are two cases bearing directly on this point. One English, Dolphin v. Layton, 4 C. P. D. 130, the other an Ontario decision, Bland v. Andrews, 45 U. C. R. 431. In the former, Lord Coleridge, C.J., and Denman, J., held on appeal from the County Court Judge that moneys paid into the County Court and held by the registrar were not garnishable in the registrar's hands in a suit brought against the person entitled to receive the money out of Court. In Bland v. Andrews it was not really necessary to decide the point involved here, and it was not decided. All the Judges, however, who sat in the case discussed the question — two of them pretty fully — and the Chief Justice (Hagarty) and Armour, J., seem to have had no doubt that moneys in the hands of a Division Court clerk were garnishable, Cameron, J., taking the opposite view. If it were not for one thing, which I shall refer to in a moment, the decision in Dolphin v. Layton would be a direct authority in this case. The moneys there were paid into Court under circumstances not materially different from those here. The defendant's right to receive them out of Court was practically the same as the defendant's right here. The registrar under the English Act corresponds, so far as this point is concerned, with our clerk, and his position with relation to moneys paid into Court and his duties and liabilities towards those entitled to receive such moneys out of Court, are in no

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respect different from those of our clerk. Section 26 of the English County Courts Act, 1888, is as follows: "The registrar of each Court, with such clerks as may be required, shall issue all summonses, warrants, process, and writs of execution, and register all orders and judgments of the said Court, and keep an account of all the proceedings of the Court, and shall take charge of and keep an account of all Court fees and fines payable or paid into Court, and of all moneys paid into and out of Court, and shall enter an account of all such fees, fines, and moneys in a book belonging to the Court to be kept by him for that purpose, and shall from time to time as may be directed submit his accounts to be audited or settled." A glance at sec. 44 of our Act will shew how closely the duties of the two officers correspond. In the matter also of giving security for the due payment over of moneys, their position seems similar. Section 40 of the English Act provides that the treasurer, registrar, and high bailiff of every Court who may receive any moneys in the execution of his duty shall give security for such sum, and in such manner and form as the treasurer from time to time shall order for the due performance of their several offices, and for the due accounting for and payment of all moneys received by them under this Act, or which they may become liable to pay for any misbehaviour in their office. The bond to be given by our clerk under sec. 13 of the Manitoba Public Officers Act is practically the same.

The only reason, and the one I referred to at the beginning, why Dolphin v. Layton may not be strictly applicable here is, that our garnishing provisions are different from those under the English Acts. Here garnishing proceedings may be taken when any debt, obligation, or liability is due. There only debts may be attached, just as was the case under our statute before the amendment in 1887. I am not satisfied, however, that the difference is material so far as this case is concerned. I am inclined to think that, if the position of the clerk is such that there is no debt, there is no obligation or liability either, and, though the judgments in Dolphin v. Layton are very short, and give but little information as to the grounds of the decision, I am unable to see that it was given on any grounds which would not have been as applicable here as there. How can it be said that the clerk of the Court owes to a suitor for whose benefit moneys are paid into Court a debt, obligation, or liability

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within the meaning of the garnishment sections of the Act. True, it is the clerk's duty to account for and pay such moneys over to the suitor; but a mere statutory duty to account for and pay over does not, it seems to me, constitute a debt, obligation, or liability. It remains simply a duty, performance of which may be enforced or non-performance punished by summary means provided by the statute itself (sec. 336), or recovery had upon the clerk's official bond. The clerk is simply an officer of the Court. The moneys are paid into Court, and are Court moneys. They are not in the clerk's hands or under his control in any other sense than as the Court's accountant or custodian, or to any greater extent than is necessary, because the Court is impersonal and must have its funds handled and kept by some one. I cannot conceive it possible, though it is asserted in Bland v. Andrews, that one person sued for a private debt by another, who happened to be the clerk of a County Court, could set off a claim to moneys lying in Court to which he might be entitled. One of the difficulties of permitting such moneys to be garnished is seen in this very case. The person who as clerk was made garnishee, is clerk no longer, and though he is still a garnishee, and, I presume, liable, if the proceedings are legal, to be called upon to pay, the moneys are no longer in his hands or under his control, but in the custody of the present clerk.

Counsel for the plaintiff argues that Denman, J., is mistaken in saying in his judgment in Dolphin v. Layton that the position of a registrar of a County Court is similar to that of a Master of one of the Superior Courts, at any rate that he is mistaken if the registrar corresponds with our County Court clerk. He argues that the same position was taken in Bland v. Andrews, that while a Master of a Superior Court, in whose hands court moneys are placed, does not pay moneys out to suitors except upon the direct order of a Judge, a County Court clerk makes, and it is his duty to make, such payments of his own accord when a suitor becomes entitled to them. Even if there were such a difference, I do not see that it concludes the matter. The mere fact that under the practice a proper order is required in one case and not in the other cannot be a sufficient reason for holding the moneys garnishable in the latter case and not in the former. A Judge's order for the payment out of Court cannot make the Court's officer, in whose custody the moneys lie, the suitor's debtor, if before the making of the

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order such relationship did not exist, but it is not a fact, at least not universally so, that the difference spoken of between a County Court clerk and a Superior Court officer exists. Up to within a few years ago it was the duty of the prothonotary of the Court of Queen's Bench, as prior to the Judicature Act it was the duty of the clerk of the Court in England, to pay over to a plaintiff moneys paid into Court by a defendant with his pleas, and this without any order whatever. The prothonotary's position in relation to such money differed in no material respect from that of the County Court clerk; as to these moneys the obligation or liability of the one was quite as absolute as that of the other. The prothonotary's official bond securing payment over of all moneys received by or intrusted to him was the same as the bond given by the clerk, and yet I do not think it was ever supposed that such moneys while in the prothonotary's hands were garnishable at the suit of a creditor of the plaintiff. I do not consider the position of a sheriff analogous; though moneys in his hands are said to be in custodia legis, they are not Court moneys or in Court in the sense in which these moneys are, nor is he an officer of the Court in the same sense that the clerk of the Court is.

It is not easy to ascertain how far decisions in the different States of the United States are applicable on a point like this, on which statutes may differ so much, but there are numerous cases in the reports where it has been held, as it was in Marine Bank v. Whiteman Paper Mills, 49 Mass. 137, that "it is contrary to public policy and not the intention of the statute that public officials should be annoyed and distracted by process of garnishment on account of funds in their official custody."

On the whole I think Dolphin v. Layton in point, and that it ought to be followed, and, apart from authority, I am of opinion that the act of the clerk in receiving and holding such moneys as those in question is purely official, and that the moneys are, properly speaking, not in his hands at all, but in the custody of the Court, and are not garnishable.

While this is my opinion, however, reasons in favour of the opposite view are strongly urged, and there is no uncertain sound about the language of the two Judges in Bland v. Andrews. There is, moreover, the fact which plaintiff's counsel vouches for, that the practice of attaching moneys in the hands of County Court clerks has been followed and

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apparently acquiesced in for some time. And there is the further curious fact that it may be said the practice has the implied sanction of the County Courts Act itself. Section 253 is as follows: "Where a garnishee pays money into Court, and the plaintiff or primary creditor is nonsuited, or where the suit is struck out or judgment given for the defendant, or where the amount paid is more than the judgment and costs, the primary debtor shall be entitled to have the said money or a balance paid over to him by the clerk of the Court forthwith after the ordering of such nonsuit, ordering of the suit to be struck out, or giving judgment for the defendant; provided that in the meantime no garnishing order or notice of adverse claim shall have been given to or served on said clerk to bind such moneys in his hands, and provided that the Judge shall not otherwise order." Whether "garnishing order" here means one in which the clerk is named as garnishee or a second order against the original garnishee, which he has handed to the clerk, it is difficult to say. If the former, then certainly the proviso is an indication that in the opinion of the legislature a County Court clerk is subject to garnishment. Admitting such to be the meaning, I hardly know what its effect should be upon me in construing the language of other portions of the Act; and, in considering whether the case of a clerk comes within such language or not, it should not, I imagine, induce me to give such language a construction which I consider it will not naturally bear. It does in some degree make me less certain that my construction is right. I might escape deciding the point, as it happens that my finding on the first objection makes a decision upon this unnecessary. It has occurred to me, however, that probably the parties would prefer a finding one way or the other, and I shall therefore decide in accordance with what I think the practice ought to be, and on the faith of the English decision referred to hold the objection well taken.

The only other question remaining to be considered is the alleged assignment of these moneys to Ricker and Featherston. It seems from Featherson's affidavit that during the time Goodier's suit against the Martin's was pending, he (Featherston) having a claim for wages against him, asked him for payment, that Goodier told him of the pending suit, and promised to pay him out of the moneys to be realized out of it. Featherston pressed for payment,

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and eventually Goodier gave him an order for $36 on Mr. McDonald, who was his solicitor in the suit against the Martins, and through whose hands the moneys to be realized were to pass, telling him the order would operate so that on presentation of it within a short time he would receive payment out of the moneys to be collected from the Martins. I think the evidence shews that at the time the order was given there was only one fund out of which payment could be expected to be made; that the nature and origin of that fund were known to and discussed by Goodier and Featherston; and that Goodier then intended to give, and supposed he was giving, and Featherston expected he was getting, an order to be paid out of these particular moneys coming through McDonald's hands from the suit against the Martins; and that McDonald understood that the order was to be paid out of the particular moneys, and intended to pay it as soon as these moneys reached his hands.

As I intimated in another case, I am not quite satisfied that it would not be well either to keep the line more distant between common orders for the payment of money and equitable assignments, or to brush it away altogether, but orders given under just such circumstances as those mentioned above were held to amount to valid equitable assignments, in Lane v. Dungannon Agricultural Driving Park Assn., 22 O. R. at p. 272, and it may be that I should follow it. The fact that the moneys were not in McDonald's hands at the time the order was given is of no consequence. The case of Brown v. Johnston, 12 A. R. 190, referred to by plaintiff's counsel, is not in point. In the present case the order was given in respect of a fund about to come into McDonald's hands in the ordinary course of events and under an existing arrangement between him and Goodier. If such had been the case in Brown v. Johnston, the decision would have been different: see per Osler, J.A., at p. 197. Now, so far as Ricker is concerned, it may be that he obtained his order under similar circumstances, but there is nothing before me to shew that he did. There is nothing in the evidence in fact to shew that he even had the order in his possession, or assented to it, beyond what may be assumed from his having been paid $20 by McDonald. Certainly there is nothing to shew that he knew what fund it was to be paid out of, or that he even discussed the matter with Goodier at all. McDonald's affidavit, although stating that he fully understood that the amount of Ricker's

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order was to be paid out of these particular moneys, in no way shews that either Goodier or Ricker had that understanding. The evidence shews nothing beyond an ordinary order, and it would be going further than any other case (something which I do not wish to do, as I think the cases have gone quite far enough), if I were to hold on the evidence that Ricker had a valid assignment. I do not hold that he had not. All I say is that the evidence on this application does not shew that he had.

Holding as I did that the garnishing order in this case was improperly obtained and that it should be set aside, I do not know that I should have gone into the question of the validity of these assignments at all, as a contest between a primary creditor and a claimant pre-supposes a valid attaching order, but I thought it better, though it might not affect the result of the present motion, to indicate my opinion as to the assignments.

The garnishing order and the service on the garnishee will be set aside. The process issued may stand as an ordinary summons. There will be no costs.

MANITOBA.

MARCH 9TH, 1907.

COURT OF APPEAL.

OTTO v. CONNERY.

Attachment of Debts — Moneys Paid to Clerk of County Court in another Action—Not a Garnishable Debt—Other Remedies—Charging or Receiving Order.

Appeal by the defendant and garnishee from an order of the Judge of the County Court of Winnipeg, upon the return of a garnishee summons, directing payment over by the garnishee to the plaintiff, the judgment creditor. The plaintiff recovered his judgment against the defendant in the County Court, and, while that judgment was unsatisfied, moneys were paid into the hands of the clerk of the County Court for the defendant, in another cause in which this defendant was plaintiff, and in which he had recovered a judg-

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ment against another person. Before the money had been paid over by the clerk to defendant, plaintiff issued a garnishee summons attaching the moneys in the hands of the clerk, and this was made absolute, after argument, by the order now appealed against.

W. M. Crichton, for defendant and garnishee.

W. Thornburn, for plaintiff.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), was delivered by

HOWELL, C.J.A.: — Upon the return of the garnishee summons the County Court Judge made an order to pay over, and in making this order he followed Bland v. Andrews, 45 U. C. R. 431. An examination of this case seems to shew that in Ontario the Judges think that moneys paid to the clerk of the Division Court in this way are garnishable. On the other hand, in England, as shewn by Dolphin v. Layton, 4 C. P. D. 130, the Court has decided that such moneys are not garnishable. It is true this last mentioned case was not fully argued and was disposed of summarily without much consideration, but it has been cited with approval in many subsequent cases.

This whole subject came up for consideration before Judge Cumberland of the Brandon County Court in a case of Ross v. Goodier, ante , and he gave a very well considered judgment on the subject, the reasoning and expediency of which certainly seem unanswerable, and I think his judgment should be adopted as the judgment of this Court. The garnishee summons must be set aside, and the order for payment over made by the learned County Court Judge reversed.

It does seem, however, that there should be some means by which this money could be made available to the plaintiff by way of equitable execution or charging order, invoking the practice in force in the Court of King's Bench. It may be that a receiver should be appointed, for the purpose of applying this money towards the payment of the plaintiff's claim.

There will be a stay of proceedings in the County Court, retaining the money in Court for a reasonable time to allow an application to be made to the County Court Judge for such relief as the plaintiff thinks he may be entitled to.

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MANITOBA.

MARCH 9TH, 1907.

COURT OF APPEAL.

MANUFACTURERS' LIFE INS. CO. v. ROWES.

Life Insurance — Promissory Note Given for First Year's Premium—Action on — Provisions of Application and Policy—Refusal of Insured to Accept Policy.

County Court appeal.

Defendant effected an insurance on his life with plaintiffs, and gave them a promissory note for $130.20, the first year's premium. It was a part of the contract that if the note was not paid the policy should be void. Plaintiffs sued upon the note, and the action was tried before MYERS, Co. C.J., who held that, as the policy ran for 3 months, plaintiffs were entitled to recover $32.55, one-fourth of the amount of the note, and he entered judgment for that amount.

Plaintiffs appealed.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

T. M. Daly, K.C., and W. M. Crichton, for plaintiffs.

E. J. McMurray, for defendant.

PERDUE, J. A.:—This is an action on a promissory note made by defendant in favour of plaintiffs and given in payment of one year's premium on a policy of life insurance for $4,000 upon the life of the defendant.

The usual application for insurance was signed by defendant, and the note appears to have been given at the same time. The application contains the following clause: "It is hereby declared and agreed . . . that I will accept the policy of insurance when issued and pay the first year's premium thereon; that said policy and interim policy, if any, shall not take effect until it has been delivered, and the first premium has been paid during my life and good health; that if any preminm be settled wholly or in part by cheque, note, or other obligation, such obligation shall not be considered as

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payment, but only as an extension of the time for payment, and if not fully paid when due, the company shall not be liable if death occurs thereafter; that non-payment of any premium when due shall void said policy except as provided by same."

Amongst the general provisions indorsed on the policy, there was one providing that if any note, cheque, etc., given in payment of a premium, should not be paid when due, the policy should be utterly void, but the note, cheque, etc., should nevertheless be paid.

The defendant received the policy through the post, but returned it shortly afterwards, asserting that it was not of the description he had applied for. It was again sent to him by the company, and again returned by him. The reason for defendant's refusal to accept the policy was, in his own words, "because the policy that I applied for was a 20 year endowment, and they gave me a 20 pay life policy." It was admitted on the argument that there was no ground for this objection, and that defendant had received the policy referred to in the application.

The defendant's contention is that he never accepted the policy, that under the terms of the application above cited the insurance never became operative, and that therefore he had received no consideration for the making of the note.

The conditions in the application in regard to the payment of the premium differ somewhat from those indorsed upon the policy. Under the application the company are not liable until the premium has been actually paid, and the giving of a note is not to be considered as payment. The condition on the policy provides that if a note taken in payment of a premium be not paid at maturity, the policy shall be utterly void, and there is the added provision that the note shall nevertheless be paid.

It appears to me, notwithstanding the statement in the application, that only actual payment of premium will suffice to render the company liable, that where a note is taken in payment of a premium, the company is liable on the policy during the currency of the note. In the present case the company sent with the policy a receipt, in which it was stated that settlement of the premium had been received by note, and that the insurance was in force until the maturity of the note. The defendant had agreed in the application to pay the first year's premium. His position, therefore, is better under the policy than it would be under strict construction

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of the aplication. If the condition upon the policy is more favourable to the defendant, the company will be bound by it, and not by that appearing in the application, if there is any difference between them.

From these considerations it appears to me that the company upon issuing the policy became insurers of the life of the defendant during the currency of the note. It cannot, therefore, be contended that there was no consideration for the note. The County Court Judge appears to have adopted this view, but was of opinion that, as the policy terminated at the end of three months, by reason of the non-payment of the note, the company were only entitled to recover for that period, that is to say, one-quarter of a year's premium.

The Judge based his decision upon Royal Victoria Life Ins. Co. v. Richards, 31 O. R. 483. In that case no policy came to the hands of the assured, he having refused to receive it, and no note for the premium had been given. In the present case the note was given, and the policy actually came to the hands of the defendant. As soon as it was issued and delivered to him, the liability of the company arose. The present suit is, therefore, for premium earned, and not, as in the above case, for damages arising from the breach of a contract.

The note sued on was given for valuable consideration, and concurrently with the giving of it the defendant agreed to pay a full year's premium under the policy, this being the exact amount of the note. By paying the note when it fell due he might have obtained insurance for a year. To permit him to pay for only three months' insurance would be, in effect, to make a new contract between the parties.

I would refer to McGeachie v. North American Life Assce. Co., 20 A. R. 187, and 23 S. C. R. 148; Manufacturers Life Ins. Co. v. Gordon, 20 A. R. 309, and particularly to the judgment of Maclennan, J.A., in the latter case at p. 335.

The appeal should be allowed with costs and judgment entered in the County Court for the full amount of the note, with legal interest since the due date.

PHIPPEN, J.A.:—It is unnecessary for me to repeat the facts, as they are fully stated in the judgment of my brother Perdue.

I entirely agree with his conclusion, that the policy delivered was not at variance with the application, and was in force until the maturity of the note.

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The only remaining question is, in what form should the plaintiff recover—in contract or in damages for breach of contract, and if the latter, has the trial Judge rightly assessed?

I cannot conform to the appellants' somewhat strenuous argument that it necessarily follows, because the defendant was insured for a portion of the term, he became liable for the full premium. The test, to my mind, rather depends on a consideration of the terms of the agreement.

What the plaintiffs were required to do to earn the first year's premium was to deliver to the defendant a policy in accord with the application. This they did. So doing, the premium became at once payable, unless, as in this particular instance, postponed by the acceptance of a note.

But it is argued that the defendant did not pay his premium at maturity, whereby plaintiffs were not insurers for a year, the contract was broken, and, as in the ordinary case of goods sold to be paid for on delivery, when delivery is refused the action must be one of damages.

I cannot apply that law to the present facts. What plaintiffs were to deliver was a policy. The nature and legal effect of this policy was dependent on the act of the insured as stated in the contract. If the insured paid the first premium in cash, he should, under the terms of the application, receive a policy which would remain in force for one year. If he paid by accepted note, that which, by the contract, he was entitled to get, was a policy in force during the currency of the obligation, and thereafter in force for the balance of the year, provided he met the note at maturity. If he did not pay at the time mentioned, he was to receive a document which the agreement specifies shall not take effect "until such first premium is paid during the lifetime of the assured in good health." It may be, in the latter case, that which he receives is of little value; yet it is the exact thing for which he bargained, and, while the contract is unimpeached, its value is not a subject for discussion. It is the defendant's own act which classifies the document as one which can only become a full policy of insurance on his thereafter complying with the condition specified. It may be that thereby he benefits plaintiffs, but he does so of his own motion. This possibility was not contemplated when the bargain was made, and no one will now be heard to complain.

The essential point is that the contract is not thereby rescinded. The action of the defendant has determined into

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which class that for which he bargained, that which has been delivered, has fallen. The contract, the accepted application, remains unbroken. It states that the consideration has been earned. I see no reason why it should not be paid. As the cause of action would appear to be in contract, and not damages for breach, I would allow the appeal with costs.

I am unable to determine if the facts in this case are identical with those upon which Royal Victoria Life Ins. Co. v. Richards, 31 O. R. 483, was decided. If so, I would be compelled, with much deference, to refuse to follow that authority.

HOWELL, C.J.A. and RICHARDS, J.A., concurred.

MANITOBA.

MACDONALD, J. MARCH 12TH, 1907.

TRIAL.

UNION INVESTMENT CO. v. WELLS.

Promissory Note—Action on—Defence—Plaintiffs not Holders in Due Course—Acquisition of Note by Indorsee after Default in Payment of Interest—Dishonour—Notice—Fraud and Misrepresentation in Procuring Signatures to Note—Purchase of Horse—Pretended Formation of Company or Syndicate.

Action upon a promissory note made by defendants in respect of the price of a horse purchased by them.

C. P. Wilson and J. F. Fisher, for plaintiffs.

A. B. Hudson, for defendants.

MACDONALD, J.:—In February, 1903, one Hitchcock, an agent of McLaughlin Bros., horse dealers, of Columbus, Ohio, brought into the village of Gilbert Plains, a Percheron horse called "Fringant," and immediately proceeded to form a syndicate to purchase him. The price was fixed at $3,500, and it was agreed that 14 names were to be secured, each taking a share; 14 names were secured and signed to the memorandum,

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exhibit 7, by which each agreed to pay McLaughlin Bros. $250 for each share in the horse, the 14 names thus making up the purchase price of $3,500. Subsequently Hitchcock secured the signatures of the defendants to the promissory note, the subject of this action.

This promissory note, however, has the names of 12 makers only, two of the 14 who had agreed to form the syndicate declining to sign the notes, and it is attempted to make the 12 makers pay for the liability which it was originally intended should be borne by 14.

The note, which became due on 1st March, 1905, was indorsed to plaintiffs on 11th February, 1905.

It is contended on the part of plaintiffs that they are holders in due course, having taken the note before maturity, without any notice of defect or defence.

The note is dated 5th March, 1903, and is payable on 1st March, 1905, with interest at 6 per cent. per annum, interest payable annually. Interest due on 1st March, 1904, was in default at the time the note became the property of the plaintiffs, and the plaintiffs had knowledge of that fact, and in their statement of claim seek to recover the interest in arrear at the time they became the holders of the note. Following the decision of Mr. Justice Mathers in a recent case of Moore v. Scott, ante p. 8, since affirmed on appeal, ante 381, in which a similar point arises, I must find that the note had been dishonoured before plaintiffs became the holders, of which fact they had notice, and they are not, therefore, holders in due course, and defendants are entitled to set up any defence they might have as against McLaughlin Bros.

Hitchcock represented that he was forming a joint stock company under the name of "The Gilbert Plains Percheron Horse Company," and it was a condition with each party agreeing to join the company, that 14 men were to become shareholders, each taking a share. The means adopted by Hitchcock in securing these names teemed with misrepresentations, deceit, and fraud. Not being able to get the 14 names, he suggested that the company should take a share, and he, himself, would take another, and it seems this was agreed to by some members of the intended syndicate, but it does not appear who they were. It was agreed that unless 14 names were secured to form the syndicate, there would be no sale.

Defendant Rowland would not sign the notes until Hitchcock secured the signatures of defendants Elliott and Mc-

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Millan. Elliott refused to sign notes until induced by Hitchcock to do so, on the promise and representation that if he would sign and afterwards wished to withdraw he could do so, and he, Hitchcock, would himself purchase his share. Elliott signed the notes, and at once sold his share to Hitchcock, and the latter gave him a document to the effect that he had purchased his share, and that he, Elliott, had nothing further to do with it. Without communicating this fact to Rowland, he secured his signature.

The defendant William Johnson signed the book subscribing for a share. Hitchcock told him there would be 14 men or no syndicate. He also made some proposition to Johnson by which, for the sum of $25, he would take his share for the first 12 months and take the share in the profits for that time; by which I understand he meant that he, Hitchcock, would pay the first instalment and take the profits for the first season, paying defendant Johnson $25. Three weeks afterwards Hitchcock called upon defendant Johnson, told him he had the 14 names, and secured his signature, he, Hitchcock, paying him at the time $10 and promising $15 the following day. He also represented that Jim and Fred Coles and one of the Sherlocks were members of the syndicate, which statement was false.

The horse was delivered after the notes were signed, with a warranty in writing previously agreed upon, and filed as exhibit 5, and, in the event of the horse not complying with such warranty, it was agreed that he was to be replaced with another of the same price, upon delivery of the horse in question in as sound and good a condition as he was at the time of the giving of the warranty.

The horse did not fill the warranty, and McLaughlin Bros. were so notified by defendant Rowland, and in reply they expressed regret and advised him to ship the horse to their stables at St. Paul and get another in his place. The horse was returned, and it was not until about this time that defendants discovered that they had been imposed upon and that Hitchcock's name was not on the note as one of the syndicate. McLaughlin Bros. offered to supply another horse to defendant Murphy, who in person returned the horse "Fringant," but he refused to accept one in its stead.

Defendants were deceived by Hitchcock from the commencement of negotiations; they were easy victims in his cunning hands. The first agreement was signed on the representation that 14 men were to sign, each liable for $250,

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and there is nothing in that agreement to lead them to suppose that they were to join in joint and several promissory notes for $3,500.

The fourteen names were secured; two of the men, however, withdrew and refused to join in the promissory notes, one of which is the subject of this action. They were justified in so refusing, as they had not agreed to become responsible under the agreement (exhibit 7) for more than $250.

Upon all the evidence, I find that Hitchcock represented that he was forming a company, each subscriber becoming liable for one share only; the form of the agreement, exhibit 7, is corroborative of that fact; it states "capital stock $3,500, No. shares 14." Failing in securing two names to replace those withdrawing, Hitchcock suggested that the company should take one share, and he would take one himself, thus making the required number; this is also corroborative of the fact that he was to form a company; otherwise, who was taking the share allotted to the company?

The parties were clearly led into this transaction, and to sign the note sued on, by misrepresentation as to the extent of their liability, and by the fraudulent scheming of Hitchcock, the agent of McLaughlin Bros.

The action must be dismissed with costs.

MANITOBA.

MATHERS, J. MARCH 14TH, 1907.

CHAMBERS.

CANADA RAILWAY ACCIDENT CO. v. KELLY.

Security for Costs—Foreign Company Doing Business in Manitoba—Head Office in Ontario—Residence abroad—Assets in Jurisdiction.

Appeal by defendant from an order of the Referee setting aside a præcipe order for security for costs.

J. E. O'Connor, for defendants.

J. B. Coyne, for plaintiffs.

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MATHERS, J.:—The plaintiffs are described in the statement of claim as a corporation "having its head office in the province of Ontario and a branch office in the city of Winnipeg."

Rule 978 provides that "where it appears by the statement of claim . . . that the plaintiff resides out of Manitoba," the defendant shall be entitled on præcipe to an order for security for costs. In North-West Timber Co. v. McMillan, 3 Man. L. R. 277, Killam, C.J., stated that a company incorporated in and having its head office in England, "must be said to be resident at its head office in England," although its whole business and all its assets were shewn to be in Manitoba.

In Ashland Co. v. Armstrong, 11 O. L. R. 414, 7 O. W. R. 401, Chancellor Boyd deduced from the authorities the conclusion that, in order to shew that a corporation resided in Ontario within the Ontario Rule, which is practically the same as ours, it should appear that the company is incorporated and has its head and controlling office within the jurisdiction where its business is carried on.

Following these authorities, I am of opinion that from the statement of claim it appears that the plaintiffs reside out of Manitoba, and that the defendant was, therefore, prima facie entitled to an order on præcipe for security for costs.

I think the plaintiffs have entirely failed to shew the possession of assets in this province of such a character and value as to entitle them to have the order set aside on that ground. The only assets consist of some office furniture of small value and the premiums which are from time to time paid into the office for transmission to the head office in Ottawa.

Assets such as these are of no value as a security to the defendant for the payment of his costs of suit.

In my opinion, the attempt to shew that the plaintiffs reside in Manitoba also fails. I do not desire to be understood as holding that in no case can a company acquire a residence in Manitoba, within the meaning of that term in the Rules relating to security for costs, where it is a foreign corporation having its head office out of Mantoba, but, in order to make such a case, a good deal more must be shewn than was done here.

It was argued that, because the plaintiffs have a license under the Foreign Corporations Act, they are in the same position as though incorporated in Manitoba.

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The license, however, only gives them a business status in this province, as a foreign corporation, but by no means makes them a domestic corporation, nor does it give them a local residence.

In Ashland Co. v. Armstrong, before cited, the same point was argued with reference to the Ontario Extra-Provincial Corporations Act, which is not different, in effect, to the Manitoba Act, but the Chancellor refused to give effect to it.

With great deference to the Referee, I must allow the appeal and restore the præcipe order for security for costs.

Costs both here and below to the defendant in any event.

MANITOBA.

MACDONALD, J. MARCH 16TH, 1907.

TRIAL.

RITCHIE v. PLAXTON.

Contract—Work and Labour—Putting Furnaces in House—Insufficient Heating Capacity—Refusal of Sub-contractor to Put in New Furnaces—Performance by Contractor—Action against Sub-contractor for Damages.

In August, 1904, plaintiff let a contract to defendant to furnish two houses in Vaughan street, Winnipeg, each with a hot air furnace, and in 1905 a contract was entered into between them for the heating, by defendant for plaintiff, of a house in Rose street.

An agreement in writing was entered into as follows:—"Winnipeg, August 5th, 1904. I hereby agree to do all the heating, tin, and galvanized iron work in two houses on Vaughan street, for S. B. Ritchie, contractor, according to plans and specifications, for the sum of $170 each, all work and materials to be to Mr. Ritchie's entire satisfaction."

A similar agreement was executed in connection with the Rose street house, both signed by defendant and accepted by plaintiff.

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Plans and specifications were produced which were alleged by plaintiff to be for the houses in question. The plans were, but the specifications were not, signed, and could be made applicable to any house. Defendant stated that he never saw the specifications until they were produced in Court. Apart from the specifications the agreement was sufficiently binding, and plaintiff entitled to have furnaces put in that would be of sufficient capacity to properly heat the houses.

Tenants complained of the houses being cold, and upon investigation it was considered that the furnaces were too small. Defendant was requested to put in larger furnaces that would sufficiently heat the houses, but he refused to do so, and plaintiff was obliged to do so himself, and brought this action to recover the damages he had been put to.

T. R. Ferguson and J. A. McKay, for plaintiff.

A. Dawson and H. Nason, for defendant.

MACDONALD, J.:—At the close of the case defendant's counsel moved for a dismissal of the action, on the ground that plaintiff, not being the owner of the houses, could not maintain the action.

Plaintiff was the contractor for the building, and, as such, would be bound to the proprietor to install sufficient heating, and he would be within his rights to see that his sub-contractors did their work properly, and, failing to do so, to recover any loss sustained by him in completing or perfecting their work.

I find that the furnaces supplied by defendant were not of a size sufficient to heat the houses, and that plaintiff is entitled to damages sustained by him in having to put in new furnaces.

I find the value of the new furnaces installed by plaintiff to replace those put in by the defendant to be $312, from which is to be deducted $50 for the two furnaces used by plaintiff and $35 due under defendant's counterclaim, making a balance due plaintiff of $227; for which I enter a verdict in his favour together with costs.

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MANITOBA.

MACDONALD, J. MARCH 16TH, 1907.

TRIAL.

MATTICE v. BRANDON MACHINE WORKS CO.

Patent for Invention—Novelty—Prior Patents—Improvements—Patentability—Infringement—Right to Restrain—Profits—Account—Costs.

Action for an injunction to restrain defendants from making and selling machinery in infringement of plaintiff's patent.

W. D. Card and R. M. Noble, for plaintiff.

G. R. Coldwell, K.C., and H. E. Henderson, for defendants.

MACDONALD, J.:—Plaintiff is the patentee by letters patent from the government of Canada, granted in the year 1896, of a machine for pickling wheat or other grain with bluestone, called the "Acme Grain Pickling Machine."

Plaintiff manufactured the machines on his farm near Carberry, immediately after the issue of the patent, and had over 100 manufactured by defendants, at their workshop in the city of Brandon.

Plaintiff in or about the year 1897 entered into an agreement with defendants for the exclusive right to manufacture and sell these machines for the term of 3 years, he, plaintiff, to be paid 50 cents royalty on each machine sold, and at the expiration of the 3 years a renewal of the agreement was effected for the further term of 4 years. This further term expired in November, 1905, and defendants would not further extend the agreement. Notwithstanding that the agreement thus came to an end, defendants continued the manufacture and sale of the machines in question, and this action is brought for an account of the profits made by defendants from the manufacture and sale by them of the machines constructed according to plaintiff's invention, or only colourably differing therefrom, and that defendants may be ordered to pay to plaintiff what upon

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taking such accounts shall be due from them, also for damages sustained by plaintiff, by reason of defendants infringing his letters patent, beyond the amount of profits ascertained to be made by defendants and for an injunction restraining defendants from making, using, or selling the machine.

The defence set up is, that plaintiff did not discover and was not the true and first inventor of the machine, but that the same was used and known in Canada and the United States of America prior to the issue of the patent granted to plaintiff, and that prior to the issue of the letters patent to plaintiff letters patent had been issued to one Robert Davidson, pursuant to the Patent Act of the Dominion of Canada, bearing date 15th May, 1896, for the invention, and the machines had been manufactured, sold, and used by Davidson prior to the issue of the patent to plaintiff.

The defendants further say that letters patent for the invention were granted to one John Wilkie by the United States of America in the year 1874, and the invention was in use long before the obtaining of the patent by plaintiff.

The evidence on the part of the defence establishes the existence of two machines manufactured prior to the patenting of plaintiff's machine, the 3 machines being for the same purpose, namely, the pickling or cleaning of seed grain. The principle in each is the same; the grain being placed in a hopper on the top of a box containing a revolving worm or screw, a box containing the liquid is placed in a different position on each of the 3 machines, but in each the idea being to have the grain and the pickling liquid fall into the box containing the worm so as to mix thoroughly in its progress to the discharging end of the box. In the Davidson machine the liquid receptacle is placed on the top of the hopper so that some of the grain must of necessity go through into the box and escape without coming into contact with the liquid.

In the Wilkie patent the box containing the liquid is placed on the top of the box containing the revolving worm or screw, and the liquid runs into the box immediately in front of the opening in the hopper through which the grain passes, and the liquid and grain fall into the conveying screw together, but the portion of the conveying screw underneath the hopper is ineffective, and that much space is wasted.

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In the Acme Grain Pickling Machine the box containing the liquid is placed on a shelf affixed to the end of the box containing the conveying screw on the side of the hopper, and the liquid is conveyed through a lead tube which runs through the shelf into the side of the box containing the conveying screw to a point underneath the opening in the hopper at the end of the box through which the grain runs, the liquid and the grain thus running through together, and the greater portion of the space lost in the Wilkie machine is thus saved.

It is said on behalf of defendants that the machine lacks novelty and invention, and that it is simply a mechanical change of the simplest kind of old parts known for years past, and evidence is offered by which every individual portion of the machine is characterized as lacking novelty. It is no doubt true that every individual portion in itself lacks novelty, but, if those individual parts can be so put together as to constitute a useful purpose, it is surely the subject of invention. If this argument were sound, neither of the machines would be the subject of patent. The novelty of any design is not negatived by the fact that all its features can be collected out of scattered prior designs, nor is it negatived by antiquity of parts: Walker on Patents, p. 606.

It is further contended that plaintiff's machine is not patentable because of the prior patents to Davidson and Wilkie. The plaintiff's claim is not that his is the inventive mind that thought out the revolving screw or the cylindrical box in which it operates; he knew of the Davidson machine, he saw its defects, and he thought out the improvement as shewn in his machine, whereby the grain and the liquid came into immediate contact; he had not known of the Wilkie machine patented in the United States, and, although his application to the United States patent office was rejected, according to the business methods adopted in that office, as described by the expert witness Kellond, such rejection is not evidence of its non-patentability. The improvement over the Davidson machine is obvious; the principal feature in the latter is in its plurality of the revolving screws or worms.

Plaintiff's patent approaches very closely the Wilkie patent, the only difference being the absence in the latter of the leading tube in the former and having nothing as its mechanical equivalent, and the saving of space in plaintiff's machine by the greater use of the conveying screw.

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The evidence is clear that plaintiff's machine, of the same size as the others, has a greater capacity; with it 100 bushels can be pickled in an hour, whereas the others have not capacity for more than from 50 to 75 per cent. of that quantity in the same time, and that it is in greater demand and more popular with the farming community than either of the other two.

The improvement when made may appear a small one, but there need not necessarily be a great deal of invention or an extensive operation to support the patent, if the invention improves the method of producing or the uses to which it can be put: Terrell on Patents, p. 102.

It seems clear to me, and I think the evidence amply justifies the conclusion, that plaintiff's machine, by the position of the fluid box and the conveying of the liquid by means of the lead tube, is a distinct improvement on the other machines.

There is, no doubt, a striking resemblance in the machine of plaintiff to the Wilkie machine, but Mr. Kellond, who impresses me as an able scientific expert, has testified that the difference is not merely mechanical, but strikes deeper; he says that the combination of lead tube leading to a point at or about the centre of the hopper, where fluid meets the grain dropping into the box, is not open to the public; he also says that the screw in plaintiff's machine is not open to the public; that the flights of the screw placed where the butts come together at the bottom, and slightly separating at the top, and also the bevelled edge, are covered by plaintiff's patent.

The Courts look with favour upon any slight change whereby an improvement is effected and find invention in it if they can.

After a careful consideration of the evidence, I am led to the conclusion that plaintiff's machine has both novelty and utility, and was properly patented, and that he is entitled to succeed in this action.

There will, therefore, be a verdict in his favour restraining defendants from manufacturing or selling machines for pickling wheat, or other grain, with bluestone constructed according to or upon the principle of, or upon any principle only colourably differing from, plaintiff's invention, and to the profits arising by the manufacture and sale by defendants of the machines since the expiration of the agreement for their manufacture and sale between plaintiff and de-

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fendants, and I direct a reference to the local Master at Brandon to ascertain such profits.

The plaintiff is entitled to the costs of the action up to and including the hearing, and I reserve the question of costs of the reference.

MANITOBA.

PERDUE, J.A. MARCH 18TH, 1907.

TRIAL.

RICHEY v. REAR.

Landlord and Tenant—Rent Payable in Grain—Agreement to Pay Half of Grain Grown on Farm—Alteration of Lease—Dispute as to Shares—Replevin—Costs.

Action of replevin brought to recover a quantity of grain.

H. A. Burbidge, for plaintiff.

A. B. Hudson and E. L. Howell, for defendant.

PERDUE, J.A.:—Plaintiff was a tenant of defendant under a written lease by which defendant let to plaintiff a half section of land for a term of 5 years. The rent payable under the lease was one-half the grain grown on the land, this half to be delivered to the lessor at the time of threshing. The lease contained provisions as to seed grain, threshing, and other things, which do not materially affect the matters in dispute.

In the early part of 1905 plaintiff desired to purchase a horse. The owner would not take plaintiff's note, unless payment was secured. Plaintiff persuaded defendant to go on the note with him, he agreeing to give defendant an additional one-quarter of the grain to be grown in 1905, as a security against the payment of the note. The first page of the lease was altered in pencil so as to read "three-fourths share" instead of "one equal half share," as it stood originally. This was assented to by plaintiff, and he signed the alteration in pencil. He states that no other change was made at the time. The copy of the lease he produced shewed

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no other alteration. On defendant's copy, however, a further change appeared on the second page, which made three-quarters of the grain deliverable at the time of threshing.

In the autumn of 1905, when plaintiff commenced his threshing, defendant appeared with his men and teams on the premises and demanded three-quarters of the grain. Plaintiff was willing to give defendant his half share and enough in addition to pay the note, which was falling due about that time. Defendant insisted upon getting the three-fourths, and a long dispute ensued, during which plaintiff took legal advice. It was late in the season, and the threshers were about to cease work for the season. It was, therefore, arranged that the threshing should go on, both parties still maintaining their rights.

It was admitted that there were threshed 931 bushels of wheat and 1,835 bushels of oats. Of this plaintiff drew home 75 bushels of wheat and 56 bushels of oats. The whole of the threshed grain appears to have been divided in the proportion of one-fourth and three-fourths. Defendant took the three-fourths and the remaining one-fourth, less the amount taken to his home, was stored for plaintiff on section 5. Plaintiff denies that he received the grain so stored.

There were two stacks of oats which were not threshed. Defendant asserted that they were green and of inferior quality, and he objected to plaintiff threshing them, on the ground that they might be mixed with the other oats and the quality of these injured. Defendant seems to have acted improperly in this, as plaintiff was entitled to have his total crop threshed. The thresher was of opinion that the stacks were fit to be threshed. After some discussion it appears to have been agreed, according to the evidence of Jamieson, the foreman of the threshing gang, that defendant should take the last two stacks of inferior oats in its unthreshed condition in satisfaction of a claim for 225 bushels of oats which he had lent to plaintiff earlier in the season, to be repaid in the autumn.

The amount of the note referred to above was $145, but defendant alleges that he had to pay $156 to take it up.

The lease was for five years from 1st December, 1903. There were, therefore, 4 crop seasons still to run when the agreement in respect of the note was entered into. It was admitted that the arrangement as to the additional one-quarter of the crop applied only to the one season, that of 1905. There was no intention to actually change the lease

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as to the balance of the term, and the pencil writing on the lease must be regarded only as a memorandum to shew an agreement by plaintiff to give a quarter of his crop for the year 1905 as a security for the payment of the note. When the note was paid plaintiff was entitled to the balance of the quarter.

It appears to me that defendant acted in an arbitrary manner and exceeded his rights. He seems to have practically taken charge of the threshing and the division of the grain and to have interfered improperly with plaintiff in refusing to allow the last two stacks to be threshed. Any consent or acquiescence on the part of plaintiff seems to have been extorted by the position in which he found himself. If the threshers went away, his grain would be greatly injured, if not ruined. He therefore had to submit to the terms defendant dictated. On the other hand, he was clearly wrong in bringing a replevin action for 700 bushels of wheat and 2,000 bushels of oats. A large part of this grain clearly belonged to defendant. The replevying of the grain and the sale of it by the sheriff, with the incidental fees, has caused a very large bill of expense to be incurred. Plaintiff might, I think, have found a more suitable action than one of replevin. If defendant, upon getting enough grain to pay the note at the current price of grain, still insisted upon taking the full quarter of the crop, he might have been compelled to account for the difference.

It is very difficult to work out the rights of the parties from the evidence. The spirit of the agreement was that defendant should get enough of plaintiff's share of the crop to pay the note. This plaintiff was willing to give, and I think he is entitled to the balance of his share after making provision for the 225 bushels of oats lent by defendant. If an amendment in the statement of claim is necessary in order to work out the rights of the parties, without further litigation, I will allow it.

One quarter of the wheat, 232¾ bushels, at 63 cents per bushel, amounts to say $146. Defendant paid $156 on the note, leaving about $10 to come from the oats. Defendant should also be allowed a reasonable sum for teaming, etc., say $25. For cost of teaming I take the charge made by the sheriff for the same service, as shewn in his return, which was put in as a part of the evidence. This makes $35 to come out of the oats. At 25 cents per bushel, 140 bushels of oats would produce this amount. Defendant would, therefore, be

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entitled to his half share of the oats, after deducting 140 bushels and making allowance for the borrowed oats. The borrowed oats were, as pointed out above, repaid by handing over to defendant the two unthreshed stacks. One-half of the threshed oats amounted to 917 bushels. From this is to be deducted the above 140 bushels and 56 bushels taken home by plaintiff, leaving 721 bushels of oats to which plaintiff was entitled.

Of plaintiff's other quarter of the wheat he received 75 bushels, leaving 157¾ bushels to which he was entitled.

The wheat appears to have fetched 63 cents a bushel, according to the evidence of defendant; 157¾ bushels of wheat at 63 cents and 721 bushels at 25 cents gives $279.57. From this should be deducted one-half the thresher's bill, viz., $52.90, leaving $226.67 to which plaintiff will be entitled out of the money in the sheriff's hands.

Plaintiff chose an expensive remedy and replevied more grain than he should justly have claimed. I think he should pay one-half the sheriff's bill of expense, exclusive of the threshing, which has been above dealt with, and should receive one-half plaintiff's ordinary taxed bill of costs. The moneys coming to him may be paid out of the funds in the sheriff's hands, and defendant will be entitled to the balance.

MANITOBA.

PERDUE, J.A. MARCH 12TH, 1907.

TRIAL.

MACDONALD v. LAWRENCE.

Vendor and Purchaser—Contract for Sale of Land—Action to Rescind — Misrepresentations — Land Speculation—Willing Purchaser.

Action by the purchaser for the cancellation of an agreement for the sale of land and for re-payment of the moneys paid by the purchaser to the vendor.

E. L. Howell and H. Ormond, for plaintiff.

T. M. Daly, K.C., and W. M. Crichton, for defendant.

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PERDUE, J.A.:—The agreement upon which the action is based is set out in the statement of claim. The agreement bears date 13th April, 1904, but the evidence shews that this date is a clerical error for 13th May, 1904. The agreement purports to be made between defendant as vendor and plaintiff as purchaser. It recites that by an agreement of sale dated 2nd April, 1904, defendant agreed to purchase the land in question, and became equitable owner of it in fee simple. The land comprises 10,080 acres of land in the province of Manitoba. There is a further recital that defendant had agreed to sell to plaintiff an undivided one-tenth interest in the land, and that plaintiff signed the agreement for the purpose of declaring that he held the one-tenth undivided interest as trustee for plaintiff. The purchase price of this one-tenth interest was $5,544, payable $1,008 in cash, $1,008 on 1st November, 1904, for which a promissory note was to be given as collateral, "and to enable the party of the first part to purchase the said lands." The balance of the purchase money was to be paid in 3 equal annual instalments on 1st November, 1905, 1906, and 1907, with interest at 6 per cent. per annum.

The cash payment was made by plaintiff, and the promissory note for the second payment was also paid. No further payments were made by plaintiff, as he repudiated the agreement before the third payment was due.

The grounds upon which plaintiff claims relief are as follows: first, that defendant, by himself and his agents, induced plaintiff to enter into the agreement by representing that the quality of the land was very good, that it was well suited for cultivation, and would readily sell at a much greater price than was being paid for it; second, that defendant was selling the interest in the lands to plaintiff at the same price at which it was being bought, and that defendant was receiving no profit from the sale to plaintiff: third, that the C. R. Gordon Land Co., or C. R. Gordon himself, were not in any way interested in the lands or the profits to be realized from the purchase or sale of the same.

Plaintiff in his evidence asserted that he was induced to purchase the interest in the lands solely upon the representations made to him by defendant. His evidence in regard to this is directly contradicted by defendant. Defendant's statements are to a certain extent corroborated by the evidence of Gordon and Morrison, and also by the evidence of

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Atcheson. The actual facts appear to have been as follows:—

Gordon had acquired the land under an agreement for purchase, and he induced Lawrence, the defendant, to endeavour to form a syndicate for the sale of the land. Lawrence was to have a one-tenth share, which share was to have been paid by the allowance to be made to him for his trouble in the matter, Lawrence not paying any cash to Gordon. Plaintiff met one Morrison on the train, and in the conversation that ensued between them Morrison mentioned this land. Plaintiff was anxious to speculate in land, and he went and saw Gordon, who arranged the terms under which plaintiff was to purchase a one-tenth interest from Lawrence. Plaintiff states that he did not make the arrangement with Gordon, but made it with defendant in a conversation which took place in the street about a week before the agreement was signed. Lawrence, upon the other hand, states that this conversation took place on the day on which the agreement was signed, just a few hours before the signing of the agreement, and that at that time the arrangements for the purchase had already been completed by plaintiff through Gordon, and that he, Lawrence, did not make the representations complained of.

After very carefully considering the evidence, I am of the opinion that defendant's account of the matter is the correct one, and that no representations were made by defendant to plaintiff which induced the latter to enter into the agreement. I believe the sale was arranged with Gordon, and that, if any representations were made, they were made by Morrison and Gordon. Plaintiff, however, states that nothing said by either Morrison or Gordon induced him to purchase; that he relied wholly upon the representations made by Lawrence.

In view of my finding upon the evidence, it is not necessary that I should discuss whether the representations complained of in regard to the quality of the land, and what it could be resold for, and other alleged representations, were material as affecting the validity of the contract.

Lawrence appears to have been under the impression that he was selling to plaintiff at the same price he himself had agreed to pay. Upon examining the agreements it appears that Lawrence had agreed to purchase from Gordon at the price of $50,400, and he was selling a one-tenth in-

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terest to plaintiff for $5,544, so that, if all the shares were sold at the same rate, the total purchase money would amount of $55,440. The first sum represents a sale at $5 per acre, the second at $5.50 per acre. Under his agreement with Gordon, Lawrence was personally liable for only $5,040. Lawrence was paying this sum with the commission he earned through making sales. Gordon, apparently, added 50 cents an acre to the selling price, so that the other 9 purchasers would pay practically all the commission. Lawrence denies that he told plaintiff he was selling to him at the price he paid. As the bargain was altogether made with Gordon, I must take Lawrence's statement as to this.

The agreement made between Lawrence and Gordon is referred to in the recital to the agreement which plaintiff signed. The date is given incorrectly, but there appears to be no doubt that there was only one agreement between Gordon and Lawrence, and that this agreement was referred to in the recital. The fact of this agreement being so referred to operates as constructive notice to plaintiff of the contents of the agreement so referred to, and if plaintiff had called for and had read the agreement, it would have shewn that Gordon was the party who was selling to Lawrence, and it would have shewn the actual price that was being paid. It would also have shewn that Lawrence was only entitled to a one-tenth interest for his own use, and was liable only for one-tenth of the purchase money, and that the balance was to be realized from sub-purchasers, of whom plaintiff was one. That the recital of the agreement between Gordon and Lawrence in plaintiff's contract is constructive notice to plaintiff of the contents of the recital agreement, I would refer to Dart on Vendors, vol. 2, p. 878; and Patnam v. Harland, 17 Ch. D. 353, 356.

It appears to me that plaintiff was anxious to be taken into the speculation in question. The land was being purchased for a speculative purpose. It was at a time when there was much activity in the sale of farm lands. Plaintiff might have made inquiry as to the position and probable value of the land in question before purchasing, but he neglected to do so. He might also have examined the agreement between Gordon and Lawrence and have assured himself as to whether the position of the matter was such as would commend itself to his judgment. This he also neglected to do. I think plaintiff has failed to make out a

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case entitling him to any of the relief claimed in the statement of claim, and I must dismiss the action with costs.

Defendant's counterclaim was abandoned at the opening of the case.

BRITISH COLUMBIA.

(VANCOUVER.)

MORRISON, J. FEBRUARY 21ST, 1907.

SINGLE COURT.

RE NEVILLE AND KELLY BROTHERS AND MITCHELL LIMITED.

Master and Servant—Injury to Servant—Workmen's Compensation Act—"Accident."

Case stated by an arbitrator under the Workmen's Compensation Act, 1902, for the opinion of a Judge of the Supreme Court of British Columbia.

The evidence shewed that the applicant, whilst engaged in the course of his employment by the respondents as a steel-cutter, was on 24th August, 1906, chipping steel with a cold-chisel, and while so engaged a piece of the chipping from the steel plate flew up and struck the applicant in the left eye, whereby he suffered serious injury. The arbitrator held that this occurrence was an accident within the above Act, but at the request of the respondents reserved the question for the opinion of a Supreme Court Judge.

W. S. Deacon, for the respondents. The occurrence herein is concomitant with the occupation and was to be expected from the nature of the work the applicant was engaged in: Steel v. Cammell, 7 W. C. C. 9.

A. M. Harper, for the applicant. Steel v. Cammell was decided on the ground that it was impossible to assign the injury to any particular date, and the Act expressly speaks of the date of injury. Moreover, the principle laid down in that decision is in our favour, as it was held that the question whether any paticular injury is an accident is to be decided from the point of view of the "man in the street."

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The object of the Act is to provide an insurance against risk commonly incidental to the particular employment: Challis v. London and Southern R. W. Co., 7 W. C. C. 23; Andrew v. Failworth Industrial Society, 6 W. C. C. 11.

MORRISON, J.:—I think the arbitrator is right in finding that the applicant's injuries were caused by an "accident" within the meaning of the Workmen's Compensation Act.

The injury arose out of and in the course of his employment, without any serious or wilful neglect on his part. I do not think it would serve any useful purpose for me to elaborate this opinion, in view of the recent decisions on this very point. To do so would only be justified in attempting to meet the arguments of counsel for the respondents, which arguments, in my opinion, are "entirely over the heads of Parliament, of employers, and of workmen:" Fenton v. Thorley, [1903] A. C. 452.

BRITISH COLUMBIA.

(VICTORIA.)

FEBRUARY 22ND, 1907.

FULL COURT.

CITY OF VICTORIA v. BELYEA.

Municipal Corporations — By-law — Amendment — Mistake —Construction—License Fee—Barristers and Solicitors.

Appeal by plaintiffs from judgment of LAMPMAN, Co. C.J., ante 161, so far as in favour of defendant.

The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

W. J. Taylor, K.C., and C. D. Mason, for plaintiffs.

F. Peters, K.C., for defendant.

IRVING, J.:—Judge Lampman came to the conclusion that the by-law of 1902, amending the by-law of 1900, was so uncertain that it was impossible to say that a tax was

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thereby imposed upon the defendant or any other person following a profession within the municipality.

The by-law of 1900, clause 27, imposed a tax upon every person following within the municipality any trade, occupation, or calling, but nothing was said as to those carrying on a profession.

In 1902 clause 27 was amended by adding after the word "any" in the first line in such paragraph the word "profession," the intention being to bring within clause 27 every person following within the municipality any profession, trade, occupation, or calling.

On the point upon which the County Court Judge decided this case no trouble arises at all, if you turn to the copy of the by-law as printed in the consolidation prepared by the city solicitor in 1901, nor if the copy of the by-law filed with the registrar of the County Court pursuant to sec. 22 of the Municipal Act of 1902 (now sec. 86 of 1906) is looked at; but if you refer to another copy of the by-law (also a legally recognized copy), you will find that there is no word "any" in the first line. In this last copy the word "any" is the first word of the second line. It is this last mentioned copy that causes the difficulty. The defendant produced this last mentioned edition, and argued that no effect could be given to the amendment of 1902 on account of this element of doubt and uncertainty. With that argument I cannot agree. According to a legally recognized copy of the by-law, that is to say, the copy filed with the registrar, the last word of the first line is "any." If the amendment of 1902 is read in connection with this legally recognized copy, then the amendment of 1902 is sensible. Why the copy to which the amendment does not apply should be preferred I cannot imagine.

In Salmon v. Duncombe, 11 App. Cas. 627, Lord Hobhouse said in giving judgment in the Privy Council: "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a court of justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used.

And in The King v. Vasey, [1905] 2 K. B. 748, where it was argued that the Court should endeavour to give some meaning to the section, and should not allow the error of the

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draftsman to destroy the clear intention of the legislature, the Court of Crown Cases Reserved, consisting of Alverstone, L.C.J., and Wills, Kennedy, Channell, and Bucknill, JJ., agreed that that argument must prevail. Wills, J., said: "Nobody, I think, who considers the enactments in question as a whole, can doubt that such was the intention of the amending section, and, if so, something must be cast aside in order to make sense of the earlier section as amended. It matters little which words go, so long as the obvious meaning is preserved."

I think the amendment of 1902 may be expanded by inserting the following words—"according to the copy filed in the County Court office."

In support of the judgment Mr. Peters contended, in addition to the point just disposed of, that there was no tax imposed at all. His argument was this: by the by-law of 1890, as amended in 1902, licenses were to be taken out by every person using or following within the limits of the corporation of the city any of the professions particularly described and mentioned in schedule A. hereto. Now in schedule A., which, of course, is not an enacting part of the by-law, the profession of barrister or solicitor was not particularly described or mentioned. These professions were not mentioned or described at all, but, instead, a sweeping clause, 27, was introduced. Clause 27 is as follows: "For every person following within the municipality any profession, trade, not hereinbefore enumerated," &c. His contention was that that was not sufficient, and that, as there was no profession particularly described or mentioned by clause 27, therefore there was no tax. It seems to me that the general expression in 27 was sufficient. I rely on the authorities above cited.

I would allow the appeal.

MARTIN, J.:—With respect to the first point, viz., the sufficiency of the amendment of 1902, the only difficulty experienced by the County Court Judge was the appearance of the word "any" more than once in the section. But this difficulty is more apparent than real, because the amendment could, having regard to the context, manifestly only sensibly relate to that first word "any," which it is obviously aimed at. Therefore, on the principles enunciated in the cases cited, the Court should give effect to said amendment. In so doing we are not going so far as we did in McGregor v. Canadian Consolidated Mines, Ltd., decided last term.

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Then as to the second point that there is no by-law authorizing this tax. This contention is based on the fact that, though clause 2 of the by-law states that "every person using or following within the limits of the corporation of the said city, any of the trades, occupations, or professions particularly described and mentioned in schedule A. hereto, shall take out a periodical license therefor," etc.; yet none of the various professions is "particularly described or mentioned" in the schedule; the mere direction in clause 27 of the schedule that "every person following any profession" shall pay the specified tax is urged to be an insufficient exercise of the power, because the particular description is not satisfied by general language embracing all professions.

A perusal of the schedule shews that it deals with many different trades and callings, and imposes, as might be expected, fees of very varying amounts to meet the circumstances, some being high and some low, and, after a particular specification in clause 27, there is an omnibus clause to cover all trades, occupations, and callings "not hereinbefore enumerated." Now, to me at least, it is quite clear that no tradesman, for example, could escape taxation under this clause, on the ground that he was not "particularly described" in the preceding clauses, even though the clause is a precautionary one and based on the fact that it is difficult, if not impossible, to enumerate or foresee all occupations, and hence to describe them. Likewise, I see no necessity, where a whole class is to be taxed, of describing its various branches. The manifest intention here is to tax the professional class as a whole, and, if the section had said, e.g., "members of the learned professions," that would have been clearly a sufficient "particular description," and it is not, in my opinion, the less so because it simply says all "professions," which includes the learned. As to what may be included in the word "profession," that, like many other things mentioned in the schedule, must be determined as a fact, should the question arise, seeing that the section places all professions on the same footing, and it would be as useless as superfluous to name each one separately and yet charge the same fee in each case. It is, in short, only necessary to "particularly describe" any person when it is necessary to distinguish him from others.

The appeal should be allowed with costs.

CLEMENT, J.:—I am not much impressed with the difficulty which the County Court Judge seems to have found as

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to the insertion of the word "profession" in clause 27 of schedule A. of the by-law in question. The only word "any" after which it could be inserted so as to make sense is the word "any" where it first occurs in the clause, and I think that without doing violence to any recognized rule of construction we may treat it as inserted there.

I agree, however, with the view contended for by Mr. Peters, that the city has not succeeded in passing a by-law to tax the defendant's profession. Clause 2 of the by-law itself says that "every person using or following . . . any of the trades, occupations, or professions particularly described and mentioned in schedule A. hereto shall take out" a license, for which a certain sum is to be paid. The schedule, after enumerating a number of trades, occupations, etc., contains a clause (27) covering "every person following within the municipality any profession, trade, occupation, or calling not hereinbefore enumerated." If the defendant's profession has been made legally liable to taxation, it must be under this clause 27 of the schedule, and it seems to me that it would be doing violence to the English language to say that in the words I have quoted the defendant's profession is "particularly described and mentioned." I quite appreciate that, if my view be sound, clause 27 of the schedule is inoperative. I think it is. If the council desired to put out a residuary drag-net, I think that (clause 2 of the by-law standing) they could only do it by a substantive section in the by-law itself. For this reason I would dismiss the appeal.

Appeal allowed; CLEMENT, J., dissenting.

BRITISH COLUMBIA.

(ROSSLAND.)

MARTIN, J. MARCH, 1907.

TRIAL.

ROYAL BANK OF CANADA v. KIRK AND RUMBALL.

Promissory Note — Demand Note — Notice of Dishonour — Indorser.

Plaintiffs sought to recover judgment against defendant Rumball as indorser of a promissory note made by the Koote-

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nay Land and Exploration Company, Limited, payable on demand. No notice of dishonour was given to defendant Rumball, it being contended by plaintiffs that no notice of dishonour was necessary in the case of a demand note, and also under the provisions of sec. 85 of the Bills of Exchange Act.

A. H. MacNeill, K.C., for plaintiffs.

C. R. Hamilton, K.C., for defendant Rumball.

MARTIN, J.: — Judgment herein as regards defendant Rumball was suspended in order to allow plaintiffs' counsel an opportunity to hand in authorities supporting his contention that, despite sec. 48 of the Bills of Exchange Act, it is not necessary before action to give notice of dishonour to an indorser of a demand note. Since then, the authorities have been submitted and considered by me, but I find they relate to the case of a maker and not an indorser, which is quite a different thing. Consequently, I hold that notice was necessary, and judgment, therefore, will be entered for defendant Rumball. See also secs. 50 (2) and 55 (2), and May v. Childley, [1894] 1 Q. B. 451, and Roberts v. Plant, [1895] 1 Q. B. 597. As regards sec. 85, the case is not, in my opinion, within it on the facts.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 7TH, 1907.

TRIAL.

DRAKE v. PAULSON.

Contract — Breach — Substituted Agreement — Amends — Negligence—Injury to Horse—Hay Destroyed by Fire—Damages—Costs—Set-off.

Plaintiff alleged a contract whereby defendant agreed with him, in consideration of his allowing him the use of his team of horses from 25th December, 1905, through the seeding season, to be returned not later than 1st June, 1906,

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to provide the timber necessary for cribbing the cellar on plaintiff's property, and also to crib the same in a workmanlike manner, such work to be completed before seeding; and he alleged that defendant did not provide the timber and crib the cellar as agreed. He also claimed damages for injury caused to one of the horses while it was in the care of and used by defendant. And, thirdly, he claimed damages in consequence of about 10 loads of hay being destroyed by fire through the negligence of defendant.

J. F. MacLean, Yorkton, for plaintiff.

J. A. M. Patrick, Yorkton, for defendant.

WETMORE, J.:—As to the first cause of action, I find that defendant not having hauled the timber and cribbed the cellar as agreed, plaintiff and defendant entered into a new agreement in substitution for that, namely, that defendant was to plough a fire-guard for plaintiff and to assist plaintiff in hauling a binder and some firewood for him; that defendant did plough the fire-guard as agreed, and has been always ready and willing to assist in hauling the binder and the firewood. There will, therefore, be judgment for defendant in respect to the cause of action set forth in the 1st, 2nd, and 3rd paragraphs of plaintiff's statement of claim, with costs.

As to the damage done to the horse, I will draw attention to the fact that no negligence whatever is alleged in the statement of claim with respect to defendant's dealing in connection with the horse. There was some evidence at the trial that it was part of the agreement when the horses were let that they were to be returned in good order. At the trial, however, plaintiff's right to recover with respect to this injury was not placed upon any contractual rights. The right was entirely placed upon the alleged fact that defendant had not treated or dealt with the horse properly. The horse had been generally well cared for by defendant while in his charge, and nothing occurred up to about a week before he was returned (and he was returned on 25th May, 1906), but about a week before he was returned a sore appeared upon his shoulder, and this continued to grow worse up to the time of the return; it kept swelling more and more. It had not reached a very bad stage at the time of the return, but after its return it developed into something serious. Defendant, however, notwithstanding the fact that this swelling

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continued to increase, as before stated, kept on working the horse until the last with a collar; he placed no pad under it; and in fact he took no other step in connection with the sore or bruise, or whatever it may be called, except to put some gall cure on it. There was a good deal of conflicting evidence as to whether this was proper treatment or not. There was a good deal of testimony to shew that farmers would continue to work a horse in the same condition that this horse was in the same manner that defendant worked it, and it was urged that because that was so I should find that defendant had dealt with this horse as an ordinarily careful man would deal with his own property. Of course, if I found that, defendant would be entitled to judgment upon this branch of the case, but I find that in dealing with the horse in the way he did he did not deal with it as an ordinarily careful man would deal with his own property. It seems to me, and I am of opinion and find, that to work a horse with a sore shoulder such as this horse had, with a collar pressing on the sore and without any protection against the pressure, and to keep on so working it, notwithstanding that the soreness was increasing, was negligence, and renders defendant liable. The plaintiff will therefore be entitled to judgment with respect to the cause of action set forth in the 4th and 5th paragraphs of the statement of claim.

With respect to the cause of action for the damage by reason of the hay being destroyed, there is nothing in the evidence to shew the character of defendant's negligence by which this hay was destroyed, but it seems to have been conceded that it was in some way destroyed by his negligence, and his liability is not disputed. It was set up that he had returned hay to make good the loss. This defence is not established. He did haul some hay to plaintiff's place, but he put it outside where the cattle could get at it, and anyway he did not notify plaintiff that he had done so, and if he had notified him the plaintiff would not have been bound to have received it. Plaintiff is entitled to judgment, therefore, with respect to the cause of action set out in the 6th paragraph of the statement of claim.

The only matter that remains is to fix the amount of damages. I may say here that all through this case the damages claimed on behalf of plaintiff have been simply out of all reason. As to the damage done with respect to the horse, he was 38 days so that plaintiff could not use him.

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I will allow him $1 a day for loss of use of the horse $38
and 50 cents a day for attendance and feed 19

which would be $57
by reason of the damage done to the horse. As to the hay, I am satisfied that the hay on the old stack was not merchantable, it was worth nothing. I find there were three tons of merchantable hay destroyed by the fire, which I allow at $3 a ton, or $9 in all. There will therefore be judgment for plaintiff with respect to the cause of action set forth in the 4th, 5th, and 6th paragraphs of the statement of claim for $66 and costs.

In taxing plaintiff's costs the deputy clerk will pay attention to item 95 of the tariff, and the costs taxed to defendant from his judgment in respect to the 1st, 2nd, and 3rd paragraphs of the statement of claim shall be set off and allowed against the plaintiff's judgment and costs in addition to those set off under provision of item number 95. When such set-off is had, the money paid into Court to be paid out to plaintiff to be applied on account of the balance remaining due plaintiff on damages and costs after such set-off, and plaintiff to have execution for the balance then remaining.

NORTH-WEST PROVINCES.

(SASKATCHEWAN.)

NEWLANDS. J. MARCH 9TH, 1907.

TRIAL.

SHEDDON v. CITY OF REGINA.

Master and Servant—Contract of Hiring—Servant of Municipal Corporation — Hiring during Pleasure — Servant Leaving in Middle of Month—Right to Wages.

Action to recover 22 days' wages of plaintiff as assistant to the secretary-treasurer of defendants at the rate of $75 per month, in all $52.20. The defence was that plaintiff was engaged by the month and left the employ of defendants without due notice.

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H. V. Bigelow, for plaintiff.

F. W. G. Haultain, K.C., for defendants.

NEWLANDS, J.:—The facts are that plaintiff was employed by defendants under a resolution of the council passed on 13th March, 1905, which was as follows: "Moved by Alderman McAra, seconded by Alderman Cooper, that J. H. Sheddon be appointed clerk in the secretary-treasurer's office during the pleasure of the council at a salary of $65 per month."

Subsequently, on 7th August, 1905, another resolution was passed by the council as follows: "Moved by Alderman McAra, seconded by Alderman Balfour, that on and after 1st September, 1905, the salary of J. H. Sheddon, assistant to the secretary-treasurer, be $75 per month."

On 10th April, 1906, plaintiff sent in his resignation to defendants, and left their employ on the 21st of that month, without such resignation having been accepted by defendants. Plaintiff's salary had been paid at the end of each month.

The ordinary principle which applies to cases of hiring is: "When a servant, whose wages are due periodically, refuses to perform his part of the contract, and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of the time during which he has served since the last periodical payment of wages:" Smith on Master and Servant, p. 182.

It is contended, however, on the part of plaintiff that his appointment having been made "during the pleasure of the council," and as the council was at liberty to dismiss him at any time, he had the corresponding right of resigning at any time. In support of this proposition plaintiff cited Rex v. Christ, 3 B. & C. 459, in which case Daly, J., said: "In Rex v. Towbridge, which was decided in 1816, but was not reported, it was held that a hiring for as long as the pauper pleased was at will." In Rex v. Christ the question was whether a pauper had obtained a settlement where he went to work for his master for his board and clothes to remain as long as he pleased, and it was held that he had not. There could be no broken term for which wages could be claimed, because no term was specified, and it is therefore not a case in point.

Plaintiff's counsel also cited Town of Sydney v. Hill, 25 N. S. R. 433, where Henry, J., in delivering the judgment of

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the Court, said: "There is nothing to shew that the defendant was appointed or engaged for any fixed or definite period, and therefore he was obviously free to resign his position at any time, as in fact he ultimately did. The defendant not being bound to serve, the town council was clearly free to increase or diminish the salary as they might think fit from time to time." The facts in this case as set out in the judgment are rather obscure, so that it is not possible to tell what the action was about, but from the above extract from the judgment it would appear that this case does not apply to the present, for the same reason as Rex v. Christ, there being no hiring for a definite time.

I can find no other cases on this point, and it seems that when a person is hired by a municipal corporation he remains there until they dispense with his services, as I can find no reported case where such an official resigned during his term of office and sued for his salary.

The only difference between the hiring of servants by municipal corporations and other persons is that the municipality hires them only during the pleasure of the municipality.

The provision in the Ordinance (C. O. 1898 ch. 70, sec. 91) is: "All municipal officers shall hold office until removed by the council or as expressed in their appointments." In this case plaintiff was hired "during the pleasure of the council at $75 per month." In Down v. Pinto, 9 Ex. 327, the plaintiff was engaged by the defendant, and was "to remain with me for at least three years at my option—salary £250 per annum." Pollock, C.B., in delivering judgment said (p. 333): "The case has been presented to us in two views. First, it is said that this is an agreement for a service which the defendants might put an end to at any period; and that the expression 'at my option' extends over every moment of the service. In my opinion, that argument is wholly untenable. The words 'at my option' only mean that the defendants are to have the option of saying whether the service shall continue for one, two, or three years. The hiring was a yearly hiring, but it gave the defendants a right to insist upon the service of the plaintiff for three years. After the expiration of the first year, the defendants could not determine the service until the end of the second year, and so with respect to the second and third years. The plaintiff could only determine the service at the end of the third year."

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It seems to me the principle laid down in this case applies to the present. Plaintiff was hired during "the pleasure of the council at $75 per month." This would, I think, be a monthly hiring to last so long as it pleased defendants, and plaintiff could be dismissed at the end of any month without notice. If this is the proper construction to put on this hiring, plaintiff certainly could not leave until the end of a month, and if he should do so he would forfeit his whole month's salary. If it had been at the rate of $75 per month, a different construction might be put upon it, but where it is for a definite period, for a specific amount, he must serve the whole term before he can recover anything. This is in accordance with the general rule which applies to all contracts, that where the plaintiff has contracted to do an entire work for a specific sum, he can recover nothing unless the work be done.

There will be judgment for the defendants with costs.

NORTH-WEST PROVINCES.

(SASKATCHEWAN.)

NEWLANDS, J. MARCH 11TH, 1907.

CHAMBERS.

PURDY v. COLTON.

Execution — Homestead Exemption—Claim by Execution Debtor for Benefit of Mortgagees — Money in Court—Payment out.

Motion by execution creditors for payment to the sheriff of money in Court, being the surplus proceeds of a sale of lands of defendant under a mortgage to plaintiff, after satisfaction of plaintiff's mortgage and a second mortgage.

W. M. Martin, Regina, for execution creditors.

J. F. L. Embury, Regina, for defendant.

NEWLANDS, J.:—In this case three quarter sections of land belonging to defendant were sold under a mortgage to plaintiff, and out of the proceeds realized plaintiff's mort-

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gage was paid off, and also a second mortgage to Fairchild & Co., Ltd. After payment of these mortgages the balance of the purchase money, some $596.94, was paid into Court. Subsequent to these two mortgages, there were registered in the land titles offices some 6 executions, amounting together to a sum considerably in excess of the amount paid into Court. After these executions, there were registered two other mortgages, which together would amount to about the sum paid into Court, and subsequent to them several more executions. Upon an application on the part of the execution creditors for the payment to the sheriff of the money in Court, defendant put in a claim that one of the quarter sections sold was his homestead, and that therefore the money realized was exempt from seizure under execution.

It was conceded that, if defendant's claim to exemption was allowed, he would receive no part of the money in Court, as in that case it would go to the subsequent mortgagees.

The object which the legislature had in view in passing the Exemption Ordinance, C. O. 1898 ch. 27, was to provide a home for the debtor and his family. This is shewn by sec. 2, which says: "The following real and personal property of an execution debtor and his family is hereby declared free from seizure." Also, sec. 5, which provides that in the case of the death of an execution debtor this property is still exempt, if it is "in the use and enjoyment of the widow and children or widow or children of the deceased, and is necessary for the maintenance and support of said widow and children, or any of them." And sec. 6, which provides that the exemption shall be lost if the debtor absconds from the Territories, "leaving no wife or family behind."

It being the object of the Ordinance to provide a home for the debtor and his family, the right must be a personal one in him, and can only be exercised for his own benefit or the benefit of his family.

In this case neither the debtor nor his family can derive any benefit from his claim of exemption, because, if these exemptions were allowed, the money in Court would go to the subsequent mortgagees. His claim of exemption is, therefore, not for his own benefit, but for the benefit of subsequent mortgagees. They have no right themselves to assert that defendant's homestead is exempt, nor do I think that defendant can in their interest claim an exemption. If no benefit can inure to defendant or his family from his claim. then there is no exemption for him to claim, and I have to

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so hold in this case. The money in Court will therefore be paid over to the sheriff for the execution creditors.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 12TH, 1907.

CHAMBERS.

RE ALLINGHAM.

Assessment and Taxes — Application to Confirm Tax Sale —Dispensing with Service of Summons on Registered Owner—Evidence.

Application by one Allingham to confirm a tax sale made by the treasurer of the Lansdowne public school district number 56 to the applicant.

W. A. Nisbet, Moosomin, for the applicant.

WETMORE, J.:—Ordinance ch. 12, 1901, sec. 1, provides that " no application for an order for confirmation of a sale of land for taxes made under the provisions of any Ordinance of the Territories shall be heard by a Judge until all persons appearing by the records of the proper land titles office to have any interest in the said land have received notice of such application, unless such notice is dispensed with by the Judge. (2) Such notice shall be given by summons of the Judge, obtained ex parte, to be served in such manner as the Judge may direct, and returnable in one month or such longer time as the Judge may direct, after service thereof." And sec. 4 of that Ordinance is as follows: " Subject to the foregoing provisions, on any application for an order for such confirmation the production of a transfer of the said land executed by the proper officer shall be prima facie evidence that all conditions have existed and all acts been performed and all requirements of the Ordinances in that behalf been complied with necessary to entitle the applicant to the order of confirmation applied for. (2) If such application be not made until

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after the expiration of one year from the date of the transfer, such transfer shall be conclusive evidence that all conditions have existed and all acts been performed and all requirements of the Ordinances in that behalf been complied with necessary to entitle the applicant to the order of confirmation applied for, except on one of the following grounds: 1, fraud or collusion; 2, that all taxes have been paid; 3, that the land was not liable to assessment."

The transfer in this case is dated 12th January, 1907. The registered owner of the land is one Francis Albert Anderson. It has been established by the affidavits of two residents of Broadview (from which place the land in question is not far distant) that they were on intimate terms with Anderson; that he left Broadview about the year 1890; that he has not returned since; that the property has ever since remained unoccupied; that they have made inquiries and endeavoured to find out Anderson's whereabouts, but without success; that they have never heard from him since he left; and that they do not know of any relatives that Anderson had in this country or elsewhere.

Under this state of facts I have been asked to dispense with the service of the summons. I am of opinion that I ought not to dispense with the service of the summons at this stage of the proceedings. If the transfer had been made more than a year before the date of this application, I am inclined to think that the facts disclosed would warrant me in dispensing with the service of the summons, for in that case the transfer would be conclusive evidence that all preliminaries had been complied with, and the confirmation could only be opposed on some of the three grounds stated in sec. 4 of the Ordinance; but, the transfer not being a year old, it is only prima facie evidence that the preliminaries have been complied with. I know that in a great many instances the requirements of the Ordinance preliminary to the sale have not been observed, and I therefore do not feel disposed to take away a man's title to his property on no better evidence than that of the transfer, because that is practically just what I am asked to do in this case. If it was established to my satisfaction, not merely by prima facie testimony of that character, but by affidavits substantiating the facts, that the preliminaries required by the Ordinance prior to a sale had been complied with, I think I would dispense with the service of the summons. No injustice is done in this case, for the applicant can produce an affidavit, or affidavits, shewing that the

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preliminaries have been complied with, or he can wait until the expiration of a year from the date of the transfer, and then the transfer would be conclusive evidence; and in either of these cases, as I have stated, I would be inclined to dispense with the service of the summons. I must decline to grant the order dispensing with the service of the summons.

YUKON TERRITORY.

MACAULAY, J. MARCH 9TH, 1907.

SINGLE COURT.

RE WESTERBERG AND FIELD.

Miners' Liens—Registration of Lien—Time — Miners' Lien Ordinance — Constitutionality — Retroactivity — Contract Made before Passing of Ordinance—Effect upon Contractual Rights—Appropriation of Payments—Account.

Application under the Miners Lien Ordinance, 1906, by H. R. Westerberg and several other miners, wage-earners, and wood-dealers, against A. D. Field, layman, and the Reliance Mining and Trading Co. of Alaska, owners, in respect of creek claim No. 56 (old 60) below discovery on Bonanza creek, for the enforcement of liens under the Act.

C. W. C. Tabor, for claimants.

J. B. Patullo and John M. Carson, for the Reliance Co.

MACAULAY, J.:—The first point I will consider is the claim of Charles F. Moore for $5,449.55, for wood supplied to the aforesaid claim and for teaming and scraping upon the claim from 1st July, 1906, to 17th October, 1906.

Under sec. 9 of the Lien Ordinance the claim may be registered at any time within 30 days after the last day's labour for which the wages are payable, or on which wood was furnished, or within 30 days after the time fixed for payment; or, if the labour is performed or wood furnished between 1st November in any year and 30th April in the following year, at any time within 30 days after 30th April.

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According to the evidence before me, the wood was all supplied and the labour performed after 1st July, 1906, and the payment for the wood was due immediately upon the wood being supplied. This is according to Moore's own evidence, so that there was no date for payment arranged at a time later than the time when the wood was delivered; the said payment becoming due immediately. According to his own evidence the last wood was supplied on 14th October, 1906, and the last work he did for Field (the layman) was performed upon that day. His lien was filed on 14th November, 1906, being 31 days after the last work was performed and wood supplied; consequently his lien was not filed within 30 days, as provided by sec. 9 of the Lien Act. His claim must therefore fail, and this application, so far as it affects his claim, must be dismissed with costs.

In regard to the claims of the other claimants, the evidence clearly shews that they were filed within 30 days from the time fixed for payment, which in all, or nearly all, the claims was 15th October, 1906; time checks having been given to the men for the balances due them and signed by Field (the layman), which time checks provided that the amount would be due "on or about the 15th day of October, 1906." The liens were filed on 14th November, 1906, and consequently comply with sec. 9 of the Lien Act in that respect.

Many objections were taken by counsel for the company to the rights of any of the claimants to a lien as against the company, and, firstly, a formal objection was raised to the constitutionality of the Act. This point has already been decided by me, in Graham v. Steinberger, decided on 29th October last, in which I held that the Act was constitutional.

Counsel further contended that the Act was not retrospective, and therefore does not apply to work done under a contract made prior to the Act, and the work done by Field (the layman) for the company was performed under a lay agreement dated 30th June, 1904, and duly registered in the office of the Gold Commissioner at Dawson on 6th July, 1904.

Counsel argued that the state of facts existing at the time should be taken into consideration, and that the law can only apply to cases that are not affected by it at the time it came into force. Many authorities were cited by counsel for the company in support of this proposition:

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among others, Phillips, pp. 15, 34, 35, 36, 42 to 49, 112; Holmested, pp. 18, 206, 266; Fowler v. Vail, 4 A. R. 275; Clarkson v. Sterling, 15 A. R. 234; Coats v. Kelly, 15 A. R. 81; In re Roden and City of Toronto, 25 A. R. 12; Williams v. Smith, 4 H. & N. 599; Hardcastle, 351; Maxwell, 299; Reid v. Reid, 31 Ch. D. 408; and many others; and, in support of the proposition that rights which have been acquired, or vested rights, are rigidly respected, Hough v. Windass, 12 Q. B. D. 237; Gardner v. Lucas, 3 App. Cas. 582; Eyre v. Winn-McKenzie, [1896] 1 Ch. 135; and many other authorities were also cited upon this point.

Also many authorities were cited in support of the proposition that if the Act can be read both ways it would not be held to be retrospective if it interfered with past transactions: also many authorities in support of the proposition that in construing a statute regard must be had to the justice or injustice that may be worked, counsel for the company arguing that in the present case a great injustice would be done to the company, who were bound by their agreement of 30th June, 1904, if this Act should be held to be retrospective and to apply to them.

Clause 4 of the lay agreement is as follows: "The owner or its representatives shall be entitled to receive all gold, silver, or other precious metals, mined and taken out of the claim during the period of this permit, and agrees and binds itself to turn over and pay to said layman at each and every clean up 72½ per centum thereof."

Counsel argued that under that agreement the company were compelled to pay to the layman at each and every clean up 72½ per centum of the gold dust extracted from the ground, and that that course had been followed, and they were entitled consequently to receive the 27½ per cent. of such gold dust clear and free from all incumbrances under the said agreement; that they were bound by the provisions of that agreement, and consequently, if their rights were affected by the lien law coming into force on 1st July last, it must be held that it was not retrospective and did not apply to cases that are not affected by it at the time it came into force; and that the company's vested rights under their agreement should not be interfered with. Counsel for the claimants argued that the Act, having been brought into effect at a period later than the time of its enactment, would, if necessary, be construed as retrospective legislation, and cited Fowler v. Chatterton, 6 Bing. 258, Regina v. Leeds and Bradford R. W.

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Co., 21 L. J. M. C. 193, Phillips, pp. 36, 37, and other authorities, in support of this proposition.

The Act was assented to on 26th May, 1906, but did not come into force until 1st July, 1906. I have examined all the authorities cited to me by counsel, and, notwithstanding the fact that the Act did not come into force immediately upon its having been passed, I am of the opinion that the Act is not retrospective, and consequently cannot apply to cases that would be affected by it before 1st July, 1906.

After examining all the authorities carefully and the provisions of the Act, I am unable to find that there is any declaration in the Act itself, or in the surrounding circumstances, that would warrant me in placing that construction upon it, and I am therefore of opinion that the Act is not retrospective.

Having come to that conclusion, the question which has presented the greatest difficulty to me is whether or not the company should be relieved from liability under the provisions of the Act by reason of their contractual rights under the agreement of 30th June, 1904, which would be affected if the Act was held to apply to them. Under this agreement of 30th June, 1904, the company were entitled to 27½ per cent. of the gold dust produced from the claim. Their contractual rights, or vested rights, in that respect have not been interfered with, because they have received their proportion of the gold dust.

If their contractual rights were affected, and the lien law was not retrospective, as I have held it not to be, then great weight should be given to the argument of counsel for the company that the law could not apply to such a case as the one before me, and consequently the company's property could not be affected by the Act.

Phillips, at p. 34, in discussing prospective and retrospective laws, says: "The presumption is that all statutes are to operate prospectively and were not made to interfere vested rights, and a retroactive effect is never to be given unless required in the most explicit terms and the intention of the legislature is unmistakable. A claim of lien cannot be maintained for work done under a contract made before the lien law took effect, although the work was done after the law came into effect." Again, at pp. 36 and 37, in discussing the subject of subsequent laws applicable to existing contracts, he says: "But where a statute provides that 'any person who shall hereafter, by virtue of any

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contract, perform any labour, shall have a lien,' it operates to authorize a lien to be created for work done since the Act took effect, although under a contract made before that date. It does not, however, cover work done before the passage of the Act. The effect, it was said, of applying such a statute to contracts in existence at the time of its passage, was no alteration of the contract to the prejudice of the owner or of the contractor. It did not affect the rights of either, but only provided a new remedy for the collection of a debt. A subsequent law extended the lien to other classes of objects, 'subjecting them to the provisions and regulations' of the prior Act. The effect in such case was to make all the provisions of the old law part and parcel of the new, which were not repugnant, and which formed portions of the provisions that regulated the lien. And where there was nothing in a statute which limited its operations to contracts made after its passage, but did limit the claim to work done after its passage, it was held nevertheless to apply to cases where the contract was made before its passage, if the labour was performed and the materials were furnished after such passage. It neither altered nor impaired the owner's contract, and was therefore not unconstitutional."

After giving this case my best consideration, I have come to the conclusion that the contractual rights between the parties to the agreement of 30th June, 1904, are not affected by the Lien Ordinance of 1906. but that new rights in favour of the third parties are created; the third parties in this case being the workmen who were employed upon the claim after 1st July, 1906; and consequently I am of opinion that the Act does apply in the case before me, and the workmen are entitled to their wages.

There was no evidence of any applications of payments having been made either by Field or the workmen when money was paid to any of them, at any time, or at the time of their final settlement with Field, and the evidence does disclose that the first attempt made at an appropriation was after their consultation with their solicitor, when they decided to file their liens, and, acting upon his advice, they then attemped to appropriate when it was too late to do so; and I am therefore of opinion that all moneys paid to the workmen after 1st July, 1906, should first be applied in payment of the wages due them for work done after that date, and only the excess should be applied to any past indebtedness; and the payments that were otherwise attempted to be

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applied, as in the case of Sidback, who applied a portion of the moneys upon a promissory note held by him against Field, cannot be upheld.

There was some evidence that the i.o.u's, or "tabs," as they were described, were exchanged between the men, and that upon being handed to Field he debited the one account and credited the other with the amount of such tab or i.o.u.

It was argued that such amounts could not be held to be moneys due for work or labour performed, and consequently that no lien could attach to those amounts. I am, however, of the opinion that, as it was a mere matter of accounting between the men, and as all of such amounts, whether credited to one or the other person, were for work so done upon the claim since 1st July, 1906, the claimants are entitled to a claim for said amounts.

There will be judgment, therefore, for the claimants (other than Moore), to enforce their respective liens against the said mining claim with the appurtenances thereto, the minerals or ore produced therefrom, and the lands occupied thereby or enjoyed therewith, or upon the machinery and chattels upon such land in case the same are attached to the land and form a part thereof, for the proper balances due to them, computed in the manner and on the basis above described, together with their costs of this application.

CORRECTIONS.

In Fraser v. Kirkpatrick, ante 287, Prendergast, J., did not take part; Wetmore and Stuart, JJ., agreed in the opinion of Harvey, J.; and Newlands, J., agreed with Sifton, C.J.

In Rex v. Gilbert, ante 295, Scott and Prendergast, JJ., did not take part.

In Rex v. Lincoln, ante 301, Scott and Prendergast, JJ., did not take part; Sifton, C.J., did take part, though not mentioned in the report; Sifton, C.J., and Newlands, J., agreed in the opinion of Wetmore, J.; and Harvey, J., concurred in the dissenting judgment of Stuart, J.

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MANITOBA.

MATHERS, J. APRIL 3RD, 1907.

CHAMBERS.

TEITELBAUM v. MUNICIPALITY OF MORRIS.

Municipal Corporations — Drainage — Flooding Lands of Private Owner—Injury to Land—Negligence—Action—Non-repair of Drain — Pleading — Defence — Denial—Other Causes of Flooding.

Plaintiff sued defendants for damages for injury to his lands sustained by flooding, caused, as he alleged, by drainage works of defendants.

Defendants demurred to the statement of claim, on the ground that no action lay against the municipality for the mere non-repair of a drain, unless such right of action was expressly given by statute; and also on the ground that the plaintiff's remedy was by arbitration under the Municipal Act, and not by an action at law.

T. L. Metcalfe and D. A. Stackpole, for plaintiff.

W. L. McLaws, for defendants.

MATHERS, J.:—The judgments of this Court in Foster v. Lansdowne, 12 Man. L. R. 42, 416, are decisive of the demurrer in this case.

There will, therefore, be judgment for the plaintiff upon the defendants' demurrer to the plaintiff's statement of claim.

The order under which the demurrer was argued provided for the disposal of all questions of law arising on the pleadings.

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Under the order, it was argued by plaintiff that paragraph 4 of the defendants' statement of defence was bad in law as not constituting any defence to the action. The paragraph objected to alleges that, if the plaintiff suffered any damage by reason of flooding, "it was solely by reason of the heavy rainfall and melting of snow and overflowing of channels in the ordinary course of nature, and not by reason of any acts of the defendants."

That defence, it appears to me, involves a denial of the acts of negligence charged by plaintiff. Under it defendants would be at liberty to prove that the injuries complained of not only might, but must, have happened independently of their neglect. It follows that the paragraph constitutes a good defence, although the form of stating it might have been improved on: McKenzie v. Township of West Flamborough, 26 A. R. 198.

The costs should be to plaintiff in any event.

MANITOBA.

MATHERS, J. APRIL 3RD, 1907.

CHAMBERS.

RE ROWAND AND STRATHCONA.

Real Property Act—Sale of Land—Caveat—Sale by Administrators—Freehold or Leasehold—Direction that Action be Brought.

Application by Lord Strathcona under the Real Property Act to discharge a caveat filed on behalf of Edward Rowand, the claimant.

John Rowland, father of the claimant, was, at the time of his death, the owner of the property in question; he made a will devising the property to his infant son, J. J. A. Rowand. The child survived his father only a couple of years, and died at the age of 6, leaving Edward Rowand his sole surviving brother.

Administrators were appointed to the estate of the infant, deceased, who, treating the property as leasehold, assumed

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to sell it, when it was bought by Lord Strathcona, then Donald A. Smith.

Edward Rowand, the claimant, asserted that the property was freehold, and not leasehold, and that it devolved upon him on the death of his infant brother, and that the sale by the administrators was void.

J. A. M. Aikins, K.C., and S. J. Rothwell, for Lord Strathcona.

G. A. Elliott, for Rowand.

MATHERS, J.:—The questions involved in this matter appear to me to be much too important to be summarily disposed of in Chambers.

The property involved is of great value, and the caveator has slept on his alleged rights for a very long time. As a condition of his now being permitted to bring an action, he must proceed with the utmost expedition. The plaintiff may begin an action to establish his alleged claim within 10 days, in which event the costs of this application will be in the cause.

In default of beginning an action within the time limited, the caveat will be discharged with costs.

If the action is begun, it must thereafter be prosecuted with all due diligence.

If the caveatee's solicitor will accept service of the statement of claim, the caveator must effect service in that way.

MANITOBA.

MATHERS, J. APRIL 3RD, 1907.

CHAMBERS.

CANADA PERMANENT MORTGAGE CORPORATION v. EAST SELKIRK SCHOOL DISTRICT CORPORATION.

Mandamus—Judgment Creditors of School Corporation—Motion to Compel Treasurer to Levy Rate to Satisfy Judgment—Status of Judgment Creditors as Applicants—Sheriff.

Application by plaintiffs for mandamus. Plaintiffs recovered judgment against defendants for $4,704 for deben-

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tures issued by defendants. In the autumn of 1906 the sheriff, on plaintiffs' behalf, instructed the secretary-treasurer of the municipality of St. Clements, within which the defendants' school district lay, to levy a rate of 17 cents to pay the judgment.

The secretary who was served with these instructions, W. R. Young, resigned his office about a month afterwards, and his successor alleged that the instructions had not been brought to his notice until recently; consequently no levy had been made at the time of the collection of the 1906 taxes, or since.

The present application was to compel the secretary-treasurer to make the levy along with the 1907 taxes.

The defendants and the municipality opposed the application for mandamus, on the ground that the various statutory requirements had not been complied with in 1906, and that the sheriff must give fresh instructions for 1907 before an application for mandamus could be made. They further asserted that a considerable portion of the lands against which the sheriff sought to proceed were exempt by law, namely, those situated within the old town of East Selkirk. Further, that the application, which was made by the plaintiffs, should have been made by the sheriff.

A. C. Ewart, for plaintiffs.

F. Heap, for defendants.

MATHERS, J.:—The preliminary objection was taken that the motion for mandamus should be made by the sheriff, and not by the plaintiffs. In support of the objection London and Canadian Loan and Agency Co. v. Morris, 9 Man. L. R. 377, was relied upon. That case, however, does not decide that the motion cannot be made by the judgment creditor. All it decides is that the motion may be made by the sheriff.

By the Public Schools Act, R. S. M. 1902 ch. 143, sec. 263 (f), the treasurer of the municipality is, for the purposes of carrying into effect the provisions of the Act, an officer of the Court. The Act contains nothing to indicate by whom an application for a mandamus to compel him to do his duty, shall be made. I have no doubt that the plaintiffs, being the parties most interested, have a right to move the Court to compel its officer to act. I am, therefore,

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clearly of opinion that the application is properly made by the plaintiffs.

The motion will stand until the 11th inst.

Costs of the argument already had must be to the defendants in any event.

MANITOBA.

APRIL 8TH, 1907.

COURT OF APPEAL.

NAGY v. MANITOBA FREE PRESS CO.

Defamation—Injury to Property by Publication of Statements Referring to it — Haunted House — Falsity of Statements—Cause of Action—Malice—Proof of Special Damage—Liability of Defendants—Quantum of Damages.

Appeal by plaintiff from judgment of MACDONALD, J., ante 20.

The appeal was heard by RICHARDS, PERDUE, and PHIPPEN, JJ.A.

J. E. O'Connor and H. Price Blackwood, for plaintiff.

A. B. Hudson and E. L. Howell, for defendants.

RICHARDS, J.A.:—A reporter employed by the defendant company discovered the following entry in what is known as the "occurrence book" at the police station in Winnipeg: "Second house east of Main street on St. John's avenue is believed by some people to be haunted at night between 11 and 12 midnight. There are parties of men hanging around the house, also in basement, awaiting the appearance of the spook. This house is at present unoccupied. The Northern Fuel Company are the agents of this house."

He then wrote the following for publication in the Manitoba Free Press, a newspaper published by the defendant company:—

"A NORTH END GHOST.

"There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt

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is in a vacant house on St. John's avenue, near to Main. He appears late at night and performs strange antics, so that timid people give the place a wide berth.

"A number of men have lately made a stand against ghosts in general, and at night they rendezvous in the basement and close around the haunted house to await his ghostship, but so far he still remains at large."

The article so written was passed upon by one of the defendants' sub-editors and allowed by him to be printed in the defendants' paper, and it was printed and published in the morning and evening editions of the 23rd October, 1905, and the weekly issue of the 25th October, 1905.

An article somewhat to the same effect as the one published by the defendants appeared in the Winnipeg Telegram newspaper, and it appears that there were rumours of some kind to the same effect before either of these papers published anything concerning the property, though it does not appear to what extent such rumours had existed prior to such publication.

Closely following the publications by the defendants, a number of people congregated in the evenings and at night, about a house owned by the plaintiff, which is the house described in the above article. The crowds so assembled did damage to the house, and the plaintiff was compelled to employ people to stay in the house to prevent greater injury being done. This continued for several weeks; a crowd of people assembling every evening. Finally the plaintiff herself moved into the house for the purpose, she says, of protecting it.

At the time of publication of the article in question, a physician named Kelly had agreed to buy the house for $11,000, intending to use it for a private hospital. He had paid down $250 on account of the purchase money, and had agreed to pay $4,750 more in cash on the 24th October, 1905. He saw the article in question in the evening edition of the defendants' paper, and then refused to make the payment of $4,750, or complete the purchase. He broke off negotiations and forfeited the $250 already paid.

The plaintiff brought this action for damages for injuries alleged to result from the publication of the article in the defendants' paper.

In dealing with this case unusual questions have to be considered. While there are many people who have no belief in ghosts, there are many superstitious people who do

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believe in them, and many such, including especially many domestic servants and children, are likely to be terrorized by the thought of phantoms being in their neighbourhood.

It is alleged by the plaintiff that the publication in question was malicious. I see nothing to support that contention. On the contrary, I take it to be evident that the publication was meant to be merely jocular, and I have no doubt that neither the reporter nor the sub-editor for a moment thought that the article would be taken seriously by any one.

It seems to me further that we must assume that men of education, such as the reporter and sub-editor must have been, would know beyond a doubt that ghosts did not exist except in the imaginations of superstitious people, and therefore would know that the publication was untrue. In a case where a person publishes an article knowing it to be untrue, it seems to me that he takes the risk of such consequences as will naturally arise from that publication.

The evidence shews that the report of the house being haunted did attract the crowd of people that did the damage, and did put the plaintiff to expense in connection with guarding the house.

Part of the claim is for damages for loss of the sale to Dr. Kelly. In his examination as a witness the latter stated that, but for this report, he would have completed his purchase. In his cross-examination he made several statements which, if not explained by other parts of his evidence, would appear to mean that his real reason for abandoning the purchase was not because of the story that the house was haunted, but because he wanted to go to Vancouver, and had changed his mind about buying the house. The trial Judge took that view of his testimony.

I have carefully read Dr. Kelly's evidence, and, with much deference, it seems to me that the Judge misapprehended its meaning as to the cause why Dr. Kelly refused to complete his purchase. What Dr. Kelly meant, I think, by the expression relied on by the Judge, was only that he had no belief in ghosts, and therefore, so far as he himself was concerned, he was not influenced one way or the other by the thought of such phantoms; but his evidence does seem to me to shew that what really influenced him in abandoning the purchase was the thought that, owing to the large percentage of people who were superstitious, and to the fact that the minds of sick people are easily influenced,

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he might lose intending patients for the private hospital which he meant to carry on in the house, because of such patients being afraid to live in a house said to be haunted. The evidence of Dr. Kelly was in no way discredited or contradicted, and therefore, following Coghlan v. Cumberland, [1898] 1 Ch. 704, and Creighton v. Pacific Coast Lumber Co., 12 Man. L. R. 546, it is the duty of members of this Court, sitting in appeal, to review that evidence, and to deal with it, as regards its effect, as fully and freely as the trial Judge has done.

It is contended by the defendants that an action of this kind does not lie; and apparently neither side has been able to find any law report of a similar action having been brought.

There is no new principle involved. The action is similar in nature to one for slander of goods. The novelty is merely in the incidents from which the right of action is alleged to arise.

It seems to me that under the statute of Westminster II., 13 Edw. I. ch. 24, there is no doubt of the right to bring the action.

It has been further contended that if such an action does lie, the plaintiff must prove three things: first, that the statement was false; second, that the article was published with actual malice; and third, that special damages resulted which is attributable to the article complained of, and to it alone.

As to the first point, it is urged that the plaintiff has not proved that the article is untrue, and that the house is not haunted. It is, of course, impossible to prove such a matter by evidence in the ordinary way. The very nature of a ghost, as understood by superstitious people, is that of a phantom appearing at rare intervals. Unless, therefore, we hold that Courts should take judicial cognizance of the fact that ghosts do not exist, the falsity of the statement could never be absolutely proved. I think that the members of a Court may, and as educated men should, assume that there are not such things as ghosts, and that therefore the statement is necessarily false.

But, if it should be seriously thought that some sworn testimony, as to the falsity of the article, is essential to the plaintiff's case, it may be pointed out that Mr. Pugh, who took charge of the house to protect it from the crowds, and who afterwards lived in it, gives the only kind of testimony

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that is possible. He says there is no truth in the article and that there was no ghost there, so far as he saw.

I do not agree with the contention that malice must be shewn to enable the plaintiff to succeed. It seems to me that people who publish an article knowing it to be false, as I assume that both the reporter and sub-editor did know in this case, must be held to have done so without reasonable justification or excuse, and to render themselves, or their principals (in this case the defendant company), liable for the natural results of such publication, even though, as in this case, that result was quite unforeseen by those causing the publication, and though no malice whatever existed.

In using the word "malice," I refer only to what is ordinarily understood by that expression. Judges have in many cases used it as meaning only the absence of reasonable justification or excuse, and have attempted when so using it to distinguish it from real malice by calling it "legal malice." I see no need for its use in the latter sense, as such use only creates confusion.

As to the third question, I think special damage is shewn in two respects: first, as to the physical injury done to the property, and the cost incurred by plaintiff in protecting the house from injury by excited superstitious people. The fact that superstitious people would be likely to assemble at the house, and when so assembling would be likely to make trouble, is something that would have occurred to the reporter and sub-editor had they taken time to remember that, while they themselves and other people of the educated class, would only treat such a report as jocular or harmlessly contemptuous, the more ignorant of humanity would through reading it be naturally and readily aroused to commit such overt acts as happened in this case. Secondly, as stated above, I also think that the effect of the article was to cause Dr. Kelly to refuse to complete his purchase of the house, as a result of which plaintiff lost the sale for $11,000. That result also seems to me a most natural one, and one which a reasonable man starting such a report would readily have foreseen had he known of the intent to buy the place for a hospital for sick people, or even for a dwelling house, and had he further taken a moment to think of the effect of that report on the minds of ignorant people. It is well known to every one that many children, servants, and others, are particularly affected by stories of this kind.

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A great deal of the real value of a house is that its use may be enjoyed as fully and with as little hindrance and annoyance as possible. Anything real or imaginary which interferes with that enjoyment is therefore a serious drawback to the value. It is to be expected that a man who is himself entirely free from belief in disembodied spirits will refuse to buy an otherwise acceptable house which is reported to be haunted, because, though he would have no fears, he knows that it will be difficult to get servants to live in it, and that young children and perhaps sick people living in it would be terrorized if the report came to their ears.

The reasonable and inevitable result of such a publication seems to me to be to greatly decrease the desirability of the house for purposes of habitation, and thereby to lessen its selling and renting value.

With regard to the quantum of damages, I find it difficult to arrive at an opinion. It is one of the many cases where they could be estimated more satisfactorily by a jury than by a Judge. Still in this case the trial Judge was, and the members of this Court are, in the position of a jury, and though the quantum of damages cannot be accurately arrived at by any course of reasoning, we must, as far as we can, put ourselves in the position of jurors and deal with the question in some such way as we think a jury of reasonable men would. It is not shewn that all members of the crowds who used to go to the house did so because of the publication in the defendants' paper, but there is evidence that some of them did, and a jury would therefore be justified in holding that at least a portion of the damage resulted from the publication in question. As to Dr. Kelly's refusal to complete the purchase, the evidence seems to me, as already stated, to shew that it was caused by the publication in question.

A good deal of evidence was given to shew that the property had greatly depreciated in value, and was unsaleable as a result of the rumour. We cannot assume that this damage will be permanent in its nature, especially if we consider the large demand there has been for dwellings in Winnipeg since this publication, and the fact that rumours of this kind get forgotten in time if not kept before the public. On the other hand, I think that substantial damage did at the time result.

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On thinking the matter over carefully as to the amount that should be assessed for damages, and allowing some part of the loss to be due to the publication in the Telegram, and to rumours otherwise started, it occurs to me that $1,000 is the nearest that I can come to the sum at which a jury of reasonable men would assess such damages as should be given against the defendant.

No case for a new trial has been made out. In my opinion, the appeal should be allowed with costs, the judgment for the defendants in the Court of King's Bench should be set aside, and judgment entered there for the plaintiff for $1,000 with costs of the action.

This is eminently a proper case to be appealed to the Supreme Court, owing to so much that is involved being new. If the defendants decide to so appeal there should be a stay of execution till one month after that appeal shall be finally disposed of.

PHIPPEN, J.A., concurred with RICHARDS, J.A.

PERDUE, J.A.:— . . . There is no direct precedent for this action to be found in the English or Canadian Courts. It is an action on the case akin to slander of title and to actionable disparagement of goods. These actions are well known and frequently discussed in reported cases. It is well settled that an action will lie for written or oral falsehoods maliciously published concerning a man's goods, where such falsehoods are calculated in the ordinary course of things to produce, and where they do produce, actual damage: Ratcliffe v. Evans, [1892] 2 Q. B. 527.

"When a defendant either knows or ought to know that special damage will happen to the plaintiff if he writes or speaks certain words, and he writes or speaks those words, desiring and intending that such damage shall follow, or recklessly indifferent whether such damage follows or not, then if the words be false and if such damage does in fact follow directly from their use, an action on the case will lie:" Odgers on Slander and Libel, 4th ed., p. 73.

If an action will lie under such circumstances, where a man's goods are disparaged, there seems no valid reason why an action should not also lie where false statements are made under like conditions in regard to his house or his real estate, which cause direct damage to him by preventing him from selling or leasing the premises. Since the argu-

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ment of this appeal, the attention of the Court has been drawn to the report of a case of Barrett v. Associated Newspapers (Limited), which appeared in the London Daily Times of the 7th and 8th March. That action seems to have been brought in respect of a statement in the Daily Mail newspaper that the plaintiff's house was haunted. Mr. Justice Grantham, before whom the case was tried, allowed it to go to the jury, apparently directing the jury that if they thought there was evidence of malice, they were to assess the damage plaintiff had suffered. The jury returned a verdict for the plaintiff, and judgment was entered for him.

Assuming that the plaintiff has disclosed in her statement of claim an actionable injury, it will be necessary to consider what she must establish in order to succeed. The present action is analogous to one of slander of title: Ratcliffe v. Evans, supra; Hatchard v. Mège, 18 Q. B. D. 771. The same necessary elements must therefore be established as would be necessary in an action for slander of title, before the plaintiff can succeed in this action. By authorities extending over a very long period, it has been established that to succeed in such an action the plaintiff must prove: (1) that the statement is false; (2) that it was spoken or published maliciously; (3) that special damage was occasioned: Rowe v. Roach, 1 M. & S. 304; Pitt v. Donovan, 1 M. & S. 639; Smith v. Spooner, 3 Taunt. 246; Pater v. Baker, 3 C. B. 868; Brook v. Rawl, 4 Ex. 521; Stewart v. Young, L. R. 5 C. P. 122; Halsey v. Brotherhood, 19 Ch. D. 386; Hatchard v. Mège, 18 Q. B. D. 775.

It would be difficult to establish conclusively the falsity of the statement complained of. One witness, Pugh, who passed a night in the house, said the statement was false, but on cross-examination he said he would not swear that there were not ghosts there. Upon the argument, the plaintiff's counsel asked the Court to assume that the statement was false. But the Court could do so only upon the ground that such a statement is repugnant to common sense and common knowledge, so that no proof of its untruth would be necessary. If the statement were admitted to be of that nature, it is difficult to see how any one was deceived by it. The article complained of is not defamatory per se. It can only be actionable if it was intended to be believed and was believed by some person who was influenced by it to the detriment of the plaintiff: Langridge v. Levy,

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2 M. & W. 531. This has an important bearing upon the consideration of the question of malice, which I shall next consider.

In some of the earlier cases it was held that to support an action for slander of title, actual malice must be shewn. This view, however, has long been overruled. In Pater v. Baker, Maule, J., expressed the opinion that there must be an intent to injure the plaintiff which might be inferred by the jury, and this view seems to be supported by the subsequent cases relating to slander of title.

It is distinctly stated by Coleridge, C.J., in Halsey v. Brotherhood, that there must be in such an action an element of mala fides and a distinct intention to injure the plaintiff. The ingredient of mala fides or intent to injure may be described in various ways, but its presence is always necessary in one form or another, and constitutes legal malice as referred to in the cases.

In view of the many decisions in which the words "malice" and "maliciously" have lately been discussed and criticized, and the old meaning and effect of these words so greatly modified, one must approach with some diffidence the discussion of the meaning now to be given to these words as used in the reported decisions relating to slander of title and analogous actions.

In Bromage v. Prosser, 4 B. & C. at p. 247, it is said that "malice" in its legal sense means a wrongful act done intentionally without just cause or excuse. This definition is approved by Lord Watson in Allen v. Flood, [1899] A. C. at p. 94. He goes on to say: "In order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer to responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law."

In Bowen v. Hall, 6 Q. B. D. 333, Brett, L.J., with the sanction of Lord Selborne, thus expressed his view: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." In Mogul Steamship Co. v. McGregor, 23 Q. B. D., Bowen, L.J., said: "'Maliciously' means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right." These last two state-

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ments of the law are approved in Allen v. Flood and in South Wales Miners' Federation v. Glamorgan Co., [1905] A. C. 250.

Now, I take it from these various definitions of legal malice that, in so far as it relates to actions like the present, the conclusion may be reached that the statement complained of must be wrongful, and it must be made with the knowledge that it will cause, or is likely to cause, injury to the plaintiff. There must be some mala fides, or improper motive, whether it be one of positive intention or of mere recklessness, coupled with a knowledge such as a reasonable person should possess that the statement is calculated to cause injury.

It cannot be pretended that the defendant in publishing the article in question intended or contemplated any injury to the plaintiff or her property. It is not as if the statement were that the house was badly constructed and unfit for occupation. If such a statement had been made, and it was untrue to the knowledge of the party making it, it might properly be held to be a wrongful act, and an intention to injure might be inferred. But nothing derogatory to the house is stated in the article in question. To speak of a house as being the chief haunt of a ghost, or to speak of the house as haunted, would not, in the minds of reasonable men living in the present age, be considered as likely to produce an injury to the owner. There was evidence produced to the effect that some persons still believe in or have a fear of ghosts. But the number of those actually affected by such a fear must be small, and we must consider the effect of the words with regard to the way they would be received by men of ordinary reason and intelligence, and not by the ignorant and superstitious. I think that any man of ordinary intelligence who read the article in question would see that it was an attempt to treat humorously an absurd rumour that had already got abroad.

It is said that in any event there was no justification or excuse for the newspaper publishing the statement. It may be that the falsity of a statement that is injurious implies malice, but in such a case the falsity must be distinctly proved. The Court cannot be asked to assume the falsity of the words, and from that to deduce the malice. That would be to assume two out of the three necessary elements, and nothing would remain except the consideration of the damages. It is true that in some of the cases we find the

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expression "without just cause or excuse" used as equivalent to "maliciously," but such use has occurred in actions for disparaging the plaintiff's goods or damaging him in his trade. A disparagement of goods or a statement damaging a man's trade are acts calculated to do immediate injury by interfering with the sale of the goods or the profitable carrying on of the trade. If the statement was not unlawful, as, for instance, puffing one's own goods and comparing them with another's to his disadvantage, no wrongful act has been done, and the presence or absence of malice seems to be immaterial: White v. Mellin, [1895] A. C. 154; Hubbuck v. Wilkinson, [1899] 1 Q. B. 86; Allen v. Flood, [1899] A. C. 1. But if the statement is prima facie injurious, as, for instance, where persons are warned against buying a certain patented article, then it is for the defendant to shew that he has just cause or excuse for making the statement. I cannot, therefore, come to the conclusion that absence of "just cause or excuse" is equivalent to "malice" in the present case. The article which the plaintiff complains of is not prima facie injurious, or likely to cause injury.

If the statement is harmless on the face of it, it is for the plaintiff to shew how it became harmful, and she must also shew that the defendant when publishing it knew it was calculated to prove harmful, and that it was published either with intent to injure, or recklessly, without caring whether injury would be caused or not.

It appears to me that intention to injure must be established either directly or by reasonable inference to support an action like the present. Intention is not an element in civil actions for slander or libel, for it is not necessary in such cases to allege malice or to prove it unless the defendant claims privilege. But this is not an action for slander or libel in the ordinary sense, and is not governed by the same rules. In actions on the case for wrongful injury, motive or intention is an essential element: Quinn v. Leathem, [1901] A. C. 524; Read v. Friendly Society, [1902] 2 K. B. 739.

If the defendants must shew "just cause or excuse," was there any such? The defendants are engaged in the business of printing and publishing newspapers. The publisher of a newspaper undertakes to furnish its readers with news respecting current matters of interest. That is an important part of his business. Shortly before the publica-

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tion of the article, a rumour that the house in question was haunted appears to have been started. The house was unoccupied at the time, and some persons hearing the rumour visited, or hung around, or went through, the house, moved by idle curiosity to ascertain the cause of the alleged manifestation, or possibly to see if some trick were being played, and to detect its perpetrator. The police became aware of the rumour and of the actions of these persons, and an entry of the matter was made in the "occurrence book" kept at the police station. A reporter on defendants' staff read this entry and reproduced it in the form in which it was published, treating it in a quasi-humorous or serio-comic style. In publishing the article the newspaper only repeated as a matter of news the rumour that had already been circulated, that was evidently rather widely known, and to which the attention of the police had been directed. A newspaper would be justified in publishing under these circumstances such an occurrence, as a piece of news, first guarding against publishing anything defamatory. In the article in question nothing improper is said about any one, nothing improper is said about the plaintiff's house, but only incidentally and inferentially is it brought into the article in describing the vicinity where the alleged ghost was seen, and where persons had been congregating to watch for it. It is clear that there was no intention on the part of the defendants to do a wrong to the plaintiff, and that it never entered into the mind of the reporter, or of any one else concerned in the publication, that the article would be likely to injure any person.

I think the plaintiff also failed to prove that she sustained special damage resulting directly from the statement complained of. This she is bound to prove: Malachy v. Soper, 3 Bing. N. C. 371; Brook v. Rawl, 4 Ex. 522; Hatchard v. Mège, 18 Q. B. D. 775; Evans v. Harlow, 5 Q. B. 624; White v. Mellin, [1895] A. C. 154.

In the statement of claim plaintiff averred special damage in that the publication of the article caused the breaking off of negotiations for sale of the property to three separate persons. The evidence failed completely in respect of two of these. Mr. Hodgins's offer had been declined by the plaintiff before the occurrence complained of, and in any event it appears to have been contingent upon his selling his own property. Mr. Hagel does not appear to have ever opened negotiations for the purchase of the house. The

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only evidence of importance in respect to this branch of the case is that referring to the transaction with Dr. Kelly. After reading the evidence of that gentleman, I must confess that I consider it very contradictory and too inconsistent to justify the finding of damage upon it alone. Dr. Kelly had purchased the house and had paid a deposit of $250. He refused to complete the purchase. In his evidence in chief he stated that his main reason for refusing to complete the transaction was the report in the Free Press. But in cross-examination he stated that that was the reason he gave for not buying, that the real reason was he had changed his mind. He admitted it was not the ghost that prevented him from buying, but it was the change of mind. Then he said the cause of his change of mind was the report about the ghost, and the other cause was that he wanted to go to the coast, that he could not say which was the real cause. Then immediately afterwards he stated that if it had not been for the report he would have completed the deal. He also on cross-examination made several admissions that were damaging to his evidence in chief and which cast much doubt upon his whole testimony. He admitted having said that the reputation the house had of being haunted did not influence him.

Upon evidence such as this it would not be safe to found damages, where damages are the gist of the action. The trial Judge refused to believe the statements of the witness that were favourable to the plaintiff, and to disbelieve those that favoured the defence. He saw the demeanour of the witness, and refused to find upon his testimony that the statement in question had caused the breaking off of the sale. In this I think he came to a proper conclusion, and this Court should not interfere with his finding upon such evidence. His finding under such circumstances should be treated in the same manner as if it were the verdict of a jury. It rested upon the plaintiff to establish by clear evidence that she had suffered damage directly caused by the article in question, and, in the opinion of the trial Judge, she failed to do this. The other claims for damages by reason of expense alleged to have been incurred for wages guarding the house, buying extra furniture, maintenance of house, car fares, etc., are not such as could, under any circumstances, be recovered in an action like the present.

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The trial Judge also points out that the rumour in question was current before it was entered in the police court book, and that it was published in another newspaper. This adds to the difficulty of finding damage directly traceable to the defendants' publication.

Evidence was put in to shew a general depreciation of value by reason of the publication of the article. Damage is the gist of an action like the present, and special damage must be proved: Evans v. Harlowe, 5 Q. B. 624; White v. Mellin, [1895] A. C. 154; Young v. McRae, 3 B. & S. 264.

The necessity of proving actual temporal loss with certainty and precision in all cases of this sort has been insisted upon for centuries: Ratcliffe v. Evans, [1892] 2 K. B. 532, and cases there cited.

"Where the special damage alleged is that the plaintiff has lost the sale of his property, it is necessary for the plaintiff to prove that he was in the act of selling his property either by public auction or private treaty, and that the defendant by his words prevented an intending purchaser from bidding or completing:" Odgers on Libel and Slander, 4th ed., p. 76, citing Tasburg v. Day, Cro. Jac. 484; Law v. Harwood, Sir W. Jones, 196. In Ratcliffe v. Evans, which was an action brought for maliciously publishing an untrue statement about the plaintiff's business, proof of general loss of trade was held to be admissible to support the action. This was upon the ground that a general loss of business had resulted as distinct from the loss of this or that known customer, and such general loss could be shewn as a fact.

Such reasons can have no application here. It must be shewn that an actual sale was prevented. Evidence of opinion as to depreciation of value, caused by the statement, is not sufficient. No lasting injury was shewn to have been caused. A rumour like the one in question is soon forgotten in this community.

The plaintiff has not proved special damage, and her action on this ground also fails.

In my opinion, the judgment appealed from should stand, and the appeal should be dismissed with costs.

Appeal allowed; PERDUE, J.A., dissenting.

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MANITOBA.

MATHERS, J. APRIL 3RD, 1907.

CHAMBERS.

TELLIER v. SCHILEMAN.

Administrator Pendente Lite — Application for Appointment of—Action to Set aside Will and Mortgage and Bill of Sale Made by Testator—Necessity for Appointment—Estate in Jeopardy—Limited Grant.

Motion by plaintiff, a daughter of the late Denny D'Aoust, in an action to set aside the will made by her father, and a mortgage and bill of sale of his business as a livery stable keeper, executed by him in favour of defendants Schileman and Dujardin, on the ground that the same were executed by him when he was in a physically weak condition and under undue influence, for an order appointing an administrator pendente lite to Denny D'Aoust's estate.

J. E. O'Connor, for plaintiff.

A. Haggart, K.C., for defendants.

MATHERS, J.:—It does not seem to me that plaintiff has made out a case for the appointment of an administrator pendente lite, in so far as that portion of the estate is concerned which is now in the possession of defendant Dujardin. He is in possession of the livery stable, and he does not claim title under the will, but relies upon conveyances executed by D'Aoust before his death. I have considerable doubt, however, whether this case, as far as defendant Dujardin is concerned, comes within either sec. 39 of the Surrogate Courts Act, R. S. M. ch. 41, or sec. 70 of the English Court of Probate Act, 1859, and whether, as against him the Court would have any jurisdiction to make the appointment asked for. I do not, however, decide this application on that ground.

Prior to the case of Bellew v. Bellew, 34 L. J. P. M. & A. 125, it had been always held that to entitle a suitor to the appointment of an administrator pendente lite a case of

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necessity must be made out. In that case Sir J. P. Wilde, while refusing the application in deference to the old practice, stated that, in future, he would assimilate the practice to that acted upon by the Court of Chancery in the appointment of receivers. A few months afterwards, however, the same Judge refused, in the case of Horrell v. Witts, L. R. 1 P. & D. 103, to appoint an administrator pendente lite of the estate of a deceased partner in a business which was being managed by the surviving partner. He intimated, however, that if the parties could make out a case of destruction of the partnership property, they might renew the application. In my opinion, the principle of that case is, that if there be any person clothed with a right to the custody and control of the estate, the appointment will not be made in the absence of a case of necessity being made out. The plaintiff has, I think, failed entirely to establish that the estate is in jeopardy. It is alleged that Dujardin sold some of the horses, but he explains that they had become unfit for the business, and that he bought others in their place; that there are now more horses than when D'Aoust died. So far as the evidence before me is concerned, it appears that the estate was benefited, instead of being injured, by the sale of these worn-out horses and the purchase of others in their stead. A similar ground for the appointment was urged in Horrell v. Witts. It was stated that the defendant had been guilty of a devastavit by selling 300 ewes. The reply there was that it was necessary because of the failure of the turnip crop. The Court does not appear to have regarded the point as of any importance, because it is not referred to in the judgment. In my view, the evidence wholly fails to shew that Dujardin is either mismanaging or wasting the estate.

In an action to set aside a conveyance alleged to have been obtained by fraud, or abused confidence, a receiver will be appointed only if from the materials before it the Court is of opinion that it is hardly possible for the transaction to stand: Kerr on Receivers, p. 73.

No such case arises on the material before me. I am, therefore, of opinion that, so far as the property conveyed to the defendant Dujardin is concerned, the application must be refused.

As to the portion of the estate other than that in the possession of Dujardin, the case is different. In my opinion, the evidence brings it, as to this portion of the estate, with-

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in the rule laid down in Bellew v. Bellew, 34 L. J. P. M. & A. 125.

If plaintiff elects to accept this limited grant within one week, the Standard Trust Co. will be appointed administrators pendente lite of all the estate of the deceased, except that portion thereof conveyed to the defendant Dujardin, and costs of the application will be in the cause; otherwise, the application will be dismissed with costs to defendants in any event.

MANITOBA.

MATHERS, J. APRIL 9TH, 1907

CHAMBERS.

GULLIVAN v. CANTELON.

Service out of Jurisdiction—Statement of Claim—Action for Commission on Sale of Lands Situate out of the Jurisdiction — Defendant Resident abroad — Breach of Contract to be Performed within Manitoba — Rules 201 (e), 202 — Assets in Jurisdiction — Service Made without Leave first Obtained—Place of Payment of Commission—Place of Plaintiff's Residence.

Appeal by plaintiff from an order of the Referee in Chambers setting aside the service of the statement of claim out of the jurisdiction.

M. G. Macneil, for plaintiff.

H. Phillipps, for defendant.

MATHERS, J.:—The plaintiff is a real estate agent residing and carrying on business at Winnipeg, and the defendant is also a real estate agent, who resides and carries on business at Indian Head, in the province of Saskatchewan. The action is for a commission on the sale of lands situate in the last mentioned province.

On 22nd October, 1906, defendant wrote a letter from Maple Creek in Saskatchewan to plaintiff at Winnipeg, of which the material part is as follows: "3680 acres of arable

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prairie lands for sale at Maple Creek, and, as I am not in a position to retail them, I will sell these lands to you, in block, at a price that you can take a good thing out of it by retailing them to your customers".

The plaintiff replied on 30th October, acknowledging receipt of defendant's letter and asking for the exact location of the lands, and continued: "After receiving this information we will look further into the matter, and we may be able to handle them for you. Should we make a sale we presume we may add our commission to the net price you have given us."

The defendant replied, enclosing a list of the lands, but I have not this letter before me, and am not aware of its contents, but I believe nothing turns upon it.

The plaintiff states in his affidavit that afterwards, on 7th December, 1906, defendant called at his office in the city of Winnipeg and agreed to pay him, as commission, whatever sum should be paid by the purchaser over and above the net price of $7.50 per acre, which defendant quoted to plaintiff as a net price, and that plaintiff undertook the employment of securing a purcheaser for the lands. He further swears that in pursuance of the employment he introduced defendant to one Dalzell of Winnipeg, who became purchaser of the land at $7.75 per acre.

On 8th December, 1906, defendant wrote to plaintiff a post-card dated at Winnipeg, in which he says: "I have this evening closed sale of the block of Maple Creek lands listed with you."

The statement of claim was served upon defendant out of the jurisdiction, but the Referee, upon the application of defendant, made an order setting the service aside. From this order plaintiff appeals,

The affidavit of defendant upon which the application was made merely states three facts : (1) that the lands are not in Manitoba; (2) that he is not and never was a resident of or domiciled in Manitoba: and (3) that he has not assets of the value of $200 in Manitoba, which might be rendered liable to any judgment which plaintiff might recover.

The existence of these facts is not, however, conclusive against plaintiff's right to sue in this province and serve the statement of claim out of the jurisdiction under Rule 201 (e), as none of them is, nor is the concurrent existence of all of them, inconsistent with the existence of a right of action founded upon a breach within Manitoba of a contract

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"which according to the terms thereof ought to be performed within Manitoba." This application might have been disposed of on the ground that the onus being upon the defendant to make out a case for setting aside the service, he had failed to do so, but for the facts put in evidence by plaintiff, which alone create any doubt as to plaintiff's right to succeed.

Plaintiff bases his right to serve the statement of claim out of Manitoba upon Rule 201 (e), but he also argued that it came within Rule 202, and I will deal with that point first. Rule 202 provides that "service out of the jurisdiction of a statement of claim . . may be allowed by the Court or a Judge," where the action is not for any matter mentioned in Rule 201, "but it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment, and that the defendant has assets in Manitoba of the value of $200, at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action." I am disposed to think that the money payable by Dalzell to defendant, under the contract, for the purchase of the lands in question, is assets within Manitoba under the authority of Brand v. Green, 13 Man. L. R. 101, but the Rule can only be invoked on an application for leave to serve the statement of claim and not to bolster up a service already made without leave. The Rule provides that "service may be allowed by the Court or a Judge" upon being satisfied of certain things. In England, Order II., Rule 4, provides that no writ of summons for service out of the jurisdiction shall be issued without the leave of the Court or a Judge, and Order XI., Rule 1, specifies the cases in which service out of the jurisdiction may be allowed. In Ontario there is no Rule equivalent to Eng. Order II., Rule 4, but, notwithstanding, it is there held that the order allowing service out of the jurisdiction must be obtained before the writ is issued: Jones v. Bissonette, 3 O. L. R. 54, 1 O. W. R. 13; Pennington v. Morley, 3 O. L. R. 514, 1 O. W. R. 246; except that in a case coming within clause (g), of Ontario Rule 162, which is the same as Manitoba Rule 201, clause (g), the writ (or in our case statement of claim) must be issued and served upon the party within the jurisdiction, before leave is applied for to serve process upon the party out of the jurisdiction: Postlethwaite v. McWhinney, 6 O. L. R. 412, 2 O. W. R. 794, 851, 3 O. W. R. 441,

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591, 696. Whether or not, under our Rules, it would be necessary to obtain leave to serve the statement of claim out of the jurisdiction before it is issued, where Rule 202 is relied upon, I have no doubt upon the authorities that leave to serve the statement of claim under that Rule must be obtained before service. In Pennington v. Morley, Chief Justice Meredith said that service effected without leave is nugatory, and that a Judge has no power to allow service nunc pro tunc. It follows that, even if the defendant has $200 assets within Manitoba, which might be made available to satisfy the plaintiff's judgment, that fact cannot be relied upon by plaintiff to support the service of the statement of claim in this case.

In none of the cases mentioned in Rule 201 and its several sub-rules is it necessary to obtain leave to effect service out of the jurisdiction; in which respect our practice differs from both the English and Ontario practice in analogous cases, and also, as I have pointed out, from the practice under our own Rule 202.

The plaintiff contends that his action comes within sub-rule (e) of Rule 201, and indeed it is manifest that it does not come within any of the other sub-rules of that Rule. Under that provision service may be made out of Manitoba where "the action is founded on any breach, or alleged breach, within Manitoba, of any contract, wherever made, which, according to the terms thereof, ought to be performed within Manitoba." That part of the Manitoba Rule is identical with English Order XI., Rule 1 (e).

The equivalent Ontario Rule 162 (e) is somewhat different, the chief distinction consisting in the omission of the words "according to the terms thereof." That the omission is material is shewn by such cases as Blackley v. Elite Costume Co., 9 O. L. R. 383, 5 O. W. R. 57, and consequently the Ontario cases can be of very little assistance in arriving at the meaning of our Rule. With the English decisions it is different. Our Rule is identical with theirs, and, although the question arose in the one case on an application for leave to begin an action by the issue of a writ for service out of the jurisdiction, and in the other case on an application to set aside service effected out of the jurisdiction where preliminary leave was not essential, the same principle is involved.

No other provision of the English Rules appears to have given the Courts so much difficulty, or been the subject of

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so much judicial interpretation, as the one under consideration, and it is not easy to reconcile all the reported cases upon it. And yet the difficulty does not seem to consist so much in a proper understanding of what the Rule means as its application to the facts in each particular case. The leading case on the subject is Reynolds v. Coleman, 36 Ch.D. 453, and the rule of interpretation laid down by Cotton, L.J., in that case, with some dissent, is generally accepted in the later cases. Cotton, L.J., there held that it is not necessary that the contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears from a consideration of the terms of the contract, and the facts existing when the contract was made, that it was to be performed within the jurisdiction. Reynolds v. Coleman was an action by an American citizen residing in England against the defendant, likewise an American citizen, residing in the United States, to enforce a contract made in England for the transfer of shares in an English company. The Court said that, although the transfer might be signed in the United States, it would have to be delivered in England, and the failure to deliver there was a breach in England, entitling the plaintiff to sue there.

In Bell v. Antwerp, [1891] 1 Q. B. 103, the facts were as follows. The defendants, a foreign company carrying on business at Antwerp, chartered the plaintiffs' ship. The plaintiffs resided in England. The charter was to load a cargo at London and proceed to Rio de Janeiro. The defendants agreed to pay the lighterage and to indemnify the plaintiffs against all lighterage on cargo at port of discharge. The action was for expenses of lighterage paid by the plaintiffs at Rio. Lord Esher, M.R., said that the obligation of the defendants to indemnify the plaintiffs would be complete as soon as the plaintiffs had paid the lighterage to the people who did it at the port of discharge; that, by the terms of the contract, no place of payment was specified, and that therefore the debtor was bound to pay on demand; that the creditor could demand payment wherever he found the debtor, and the debtor was bound to pay there. From which it was deduced that payment by the terms of the contract might be either at Rio or elsewhere, and therefore the case was not within the Rule. He also thought that what Cotton, L.J., meant in Reynolds v. Coleman was that you must look at the contract, and, construing it according to the ordinary rules of construction with

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regard to contracts, see whether it appears to be one to be performed within the jurisdiction. Kay, L.J., on the other hand, accepted fully the rule laid down by Cotton, L.J., that the surrounding circumstances at the time the contract was made must be looked at, and, so construing the contract, agreed with the Master of the Rolls that it was not a case for service out of the jurisdiction.

Lord Esher arrived at the conclusion that, by the terms of the contract, payment might be made at Rio because the plaintiffs might elect to demand and therefore to accept payment there. But surely the test of where payment by the terms of the contract is to be made is not to inquire if the plaintiff may elect to take payment there, but whether the defendant may insist that payment be made there, against the will of the plaintiff.

The place where a contract is to be performed within the meaning of the Rule, in my opinion, is the place where the party to perform it may, irrespective of any election or consent of the other party, discharge his obligation under the contract by doing what he is required to do at that particular place. With considerable diffidence, I venture, therefore, to doubt the soundness of the reasoning on which Lord Esher's conclusion was based, but the conclusion that there was nothing to indicate that payment might not be made at Rio is approved of in subsequent cases.

It is very difficult to reconcile this case, in principle, with the later decisions, even with those by which it is approved, unless it be upon the theory suggested by Lord Justice Kay during the argument, but not referred to in his judgment, that because by the charter express provision is made for the payment of some of the charges in London, an inference is raised that the charges not so provided for are payable elsewhere.

The same question came before the Court of Appeal again in Rein v. Stein, [1892] 1 Q. B. 753. The plaintiffs, British subjects residing in England, sued the defendant, a German residing at Hamburg, for the price of several tons of broken glass consigned by the plaintiffs to the defendant for sale, and sold by him accordingly. One of the terms was "cash against bills of lading," and Kay, L.J., said: "Prima facie, in a commercial transaction, when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive

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the money resides and carries on business. I therefore think that cash must mean cash to be paid in England."

In Hoerler v. Hanover, 10 Times L. R. 22, a contract was made at Linden by which it was agreed that the plaintiff should receive a commission of 5 per cent. on all remitted net amounts of moneys on the sale of goods of the defendants—the defendants to collect the accounts. The plaintiffs carried on business in England, and the defendants at Hanover. The action was for commission on sales made in England. Baron Pollock said the case was completely covered by Reynolds v. Coleman. This was, he said, a contract with a foreign firm for money to be paid to the plaintiff for commission to be earned by him in England.

In Thompson v. Palmer, [1893] 2 Q. B. 80, the plaintiff, an engineer residing at Newcastle, sued the defendants, a Spanish firm, for commission agreed to be paid for superintending the construction of a public work in Spain. The plans and specifications would be prepared in England, and the plaintiff was not bound to spend his whole time at the work. The amounts payable were specified in English currency. No place for payment was named. The Court thought the plaintiff would not be bound to accept payment elsewhere than at Newcastle, where he would have the data wherewith to check the amount tendered, and that that was one of the circumstances to be looked at. The service out of the jurisdiction was allowed to stand.

The "Eider," [1893] P. 119, is a case where service out of the jurisdiction was not allowed, but the facts are exceptional. A foreign ship owned by the defendants, a German company, was stranded within the three-mile limit off the English coast. A Swedish and a Hamburg salvage company, under contract with the defendants made in the German language, salved the ship and conveyed her, as required by the contract, to the neighboring English port. The contract price was to be paid to the Hamburg salvage Company. It was held by Sir Francis H. Jeune, the President, that, as the money was to be paid to the Hamburg Company, and there being no place for payment specified, the general principle of law applied that the debtor must seek his creditor, and Hamburg was the place of payment. In the Court of Appeal Lord Esher said: "There is no place specified in the contract for the payment. What then is the ordinary rule? That the debtor must follow the creditor and must pay where his creditor is."

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Although in that case leave to serve was refused, the principle of the previous cases was adhered to, and no new principle was stated. The other leading case in which leave to serve was refused is Comber v. Leyland, [1898] A. C. 524. There the defendants carried on business at Pernambuco. The plaintiffs were bankers at Liverpool. Under arrangement the defendant was to receive certain moneys for the plaintiff and to remit the moneys to the plaintiffs, by first class bank bills on England. Lord Herschell stated that to remit meant to send by mail, and that, having done that, the defendant had done all he was to do; and that, therefore, all the contract was to be performed at Pernambuco. As pointed out by the Court of Appeal in the subsequent case of DuVal v. Gans, [1904] 2 K. B. 685, the case turned on its own special circumstances, and was not intended to overrule the previous decisions of the Court of Appeal.

There is another class of cases where, in seeking an interpretation of the Rule under consideration, the principle of law is applied that where no place of payment is specified, and there is nothing in the circumstances to indicate where the place of payment is, the debtor must seek his creditor. These are chiefly cases of the sale of goods such as Robey v. Snaefel, 20 Q. B. D. 152, Fry v. Reggio,, 40 W. R. 120, and DuVal v. Gans, above cited; but one case, The "Eider," in which the principle was applied, was upon a contract for services. This latter case was approved by the House of Lords in Comber v. Leyland, as was also Bell v. Antwerp, and in DuVal v. Gans, Reynolds v. Coleman and Rein v. Stein were approved and followed, and Comber v. Leyland and The "Eider" distinguished.

From the cases cited certain principles of construction are to my mind clearly established:—

(1) The phrase in the Rule "according to the terms thereof," does not mean that the contract must state in express terms that it is to be performed within the jurisdiction, but it is sufficient if it appears from a consideration of the contract, and of the facts existing when the contract was made, that it was to be performed within the jurisdiction.

(2) It is not necessary that the whole contract should be performed within the jurisdiction, but it is sufficient if part of the contract is to be so performed, and there is a breach of that part.

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(3) Where the breach is the non-payment of money, and the place of payment cannot be inferred either from the contract or the circumstances existing when it was made, the Court will assume that the parties intended the ordinary rule to apply that the debtor must seek his creditor.

What are the facts of the case? The defendant, residing at Indian Head, in Saskatchewan, owning a block of land in that province, writes to the plaintiff, an estate agent in Winnipeg, offering him the lands for sale for the purpose of being retailed to the plaintiff's customers, as, he writes, "I am not in a position to retail them." Can there be any doubt that the defendant intended the retailing to be done in Winnipeg, and that he believed there were facilities for that class of business at Winnipeg that did not exist in Saskatchewan? Next we find him, instead of appointing an agent in his own province, coming to Winnipeg and appointing the plaintiff his agent here to procure a purchaser for the lands. Was it intended that the plaintiff should go to Saskatchewan and there find a purchaser? Clearly not. A Winnipeg agent was appointed because the defendant believed there were better opportunities for selling the lands here, than in the province where the lands were situate. I have no doubt, therefore, that, construing the contract in accordance with the first of the above mentioned rules, the portion of the contract which consisted in finding a purchaser for the lands was to be performed in Manitoba.

Is there anything to indicate where the agent's commission was to be paid? The sale was to be made at Winnipeg, and the customary deposit would be paid there to the agent. From that deposit he would have a right to deduct his commission. That would be a payment in Manitoba. The facts of this case are very similar to those in Hoerler v. Hanover, above referred to, and what was there said by Baron Pollock is extremely applicable to this case. "This was," he said, "a contract with a foreign firm for money to be paid to the plaintiff for commission to be earned by him in England. The action was brought for the commission, and there could be no doubt it was a fit case for service out of the jurisdiction."

If the place of payment is not otherwise sufficiently indicated, in my opinion the third rule above mentioned applies, and the defendant must come to the plaintiff, and

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where the plaintiff resides is the place where payment must be made.

I agree entirely with the conclusions of law arrived at by the Referee in his considered judgment, but, with great deference, I cannot agree with his application of the law to the facts of this case.

The appeal must be allowed, and the order of the Referee setting aside the service of the statement of claim reversed. Costs of both applications will be to plaintiff in any event of the cause.

MANITOBA.

DECEMBER 4TH, 1906.

COURT OF APPEAL.

RE BANNATYNE AND PRITCHARD.

Assessment and Taxes—Tax Sale—Municipality Becoming Purchaser—Absence of Proper Authority to Reeve to Bid at Sale—Invalidity of Sale—Real Property Act.

Appeal by Pritchard from an order under the Real Property Act declaring that the petitioner, Annie Bannatyne, was the owner of an estate in fee simple in the lands in question.

Prior to 11th September, 1893, the petitioner was the owner of certain land in the municipality of Woodlands. On that date the municipality offered the land for sale, and it was bought in by the reeve, assuming to act for the municipality. The tax sale certificate was subsequently sold by the municipality to one John Dyer, and upon this a tax sale deed issued to him He afterwards conveyed to the appellant, who went into possession and applied to bring the land under the Real Property Act. The petitioner filed a caveat, claiming that the tax sale deed was bad, and afterwards proceeded upon the caveat by way of petition. On the hearing of this petition an issue was directed to try the question in dispute. Facts were agreed upon by counsel.

The principal objections raised to the tax sale were: that there was no report from the Court of Revision to the council in 1892; that there was no evidence that a resolution was passed by the council appointing a place of sale, other than the fact that the clerk of the municipality made an affidavit that the place of sale was never fixed by him

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without instructions from the council, and, although there was no record of any such resolution in the minutes of the council, he had no doubt that such resolution was passed; that there was nothing in the records of the council to shew that any resolution was passed directing in what paper the lands should be advertised; that there was no resolution of the council directing the treasurer to procure lists of lands liable to be sold for taxes, but the following resolutions were passed: on 10th June, 1893, that the treasurer be instructed to take the necessary steps to to sell the land in arrears for taxes, and on 8th July, 1893, that the resident as well as the non-resident patented lands in arrears for taxes be advertised for sale, according to a similar resolution at a regular general meeting of council; that no person was appointed by the municipality to attend at the tax sale and bid on behalf of the municipality, but the following resolution was passed at a meeting held on 12th August, 1893, "that the reeve is deputed to attend tax sale on behalf of the municipality."

It was admitted that in other respects the taxes were properly levied, and the tax sale properly carried on.

A. B. Hudson and E. L. Howell, for the appellant.

C. P. Wilson, for the respondent.

THE COURT (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), dismissed the appeal, holding that because there was no resolution authorizing the reeve to attend the sale and bid on behalf of the municipality, there could be no valid sale, and that the curative clauses in the Assessment Act did not protect the purchaser.

MANITOBA.

MATHERS, J. APRIL 12TH, 1907.

TRIAL.

McMILLAN v. GUNN.

Trust—Conveyance of Land upon Trust—Sale of Part by Trustee to Purchaser for Value—Power of Sale without Notice to Cestui que Trust — Implication from Circumstances — Reconveyance of Lands Unsold — Redemption —Terms.

Defendant Gunn was the administrator of the estate of one John Sharpe. Plaintiff John McMillan had transferred

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a quantity of land to Sharpe in trust for moneys advanced, and there was an understanding between the two men that when the amount due was paid off, the property was to be re-transferred.

Sharpe sold a part of the land to defendant Midwinter; Sharpe afterwards died, and Gunn was appointed administrator of his estate, and, as such administrator, expressed his willingness to re-transfer the lands subject to the sale to defendant Midwinter, but plaintiffs insisted on a reconveyance of the land free from Midwinter's interest, and brought this action to enforce their alleged rights.

Defendant Midwinter asked for specific performance of the contract of sale.

L. McMeans and F. R. Sproule, for plaintiffs.

H. A. Burbidge, for defendant Gunn.

H. A. Robson, for defendant Midwinter.

MATHERS, J.:—I am disposed to think that the Statute of Frauds is a bar to plaintiffs' right to recover upon any trust, other than that admitted by defendant Gunn. However, as I have arrived at a conclusion adverse to plaintiffs upon another ground, I leave that question unexamined.

I would infer from the circumstances of this case alone that Sharpe had a right to sell, without notice to plaintiffs. At the time of the transfer of the lands to Sharpe, the plaintiff John McMillan was indebted to him in a considerable sum of money. In order to prevent a portion of the lands from being sold by the Sun Life Assurance Company, who were mortgagees thereof, Sharpe advanced about $2,800 more. This latter sum was raised, to the knowledge of McMillan, upon the promissory note of Sharpe, indorsed by McKerchar & Forrester. It was intended that the lands should be sold as speedily as possible, in order, first, to take up this note with the proceeds and afterwards to apply on the old indebtedness of McMillan to Sharpe. The title was vested in Sharpe absolutely by a certificate under the Real Property Act, and no caveat was registered by McMillan shewing any interest he might claim in the lands. It has been held by the Supreme Court that under such circumstances there is a right of sale without notice: Oland v. McNeil, 32 S. C. R. 23. But the case does not depend upon inferences alone. The plaintiff John McMillan admitted, in cross-examination, that Sharpe had the same right to sell

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that he had. There is no evidence that notice was a prerequisite to a valid exercise of the power of sale by Sharpe.

Upon a consideration of the whole case, and bearing in mind that the only person who could contradict the story told by plaintiffs is dead, I find that Sharpe had a right to sell the lands, or any part thereof, without notice to plaintiffs, or either of them.

In this view it is entirely immaterial whether or not defendant Midwinter had or had not notice of the plaintiffs' claim. It is not alleged that the sale was made fraudulently, or that there was such an inadequacy in the price as to indicate fraud. If such a case were alleged and proved, the Court would, no doubt, interfere. But where, as in this case, nothing of that kind appears, the only question to be determined is the vendor's authority to make the sale. That question being determined adversely to plaintiffs, the purchaser has a right to have the sale carried out.

Having arrived at this conclusion, it is unnecessary for me to consider the question of Midwinter's defence as an innocent purchaser for value, without notice of plaintiffs' claim.

There will be judgment referring it to the Master to take an account of what is due from the plaintiffs to the administrator of the Sharpe estate, for debt, interest, and costs, and to fix a time for the payment thereof; upon payment of the amount so found, and upon the plaintiffs indemnifying by a satisfactory bond of indemnity or otherwise relieving the defendant Gunn from liability upon the covenants in the mortgages executed by him upon the lands, or any of them, the defendant Gunn will re-convey the lands unsold to the plaintiff Catherine McMillan free from all incumbrances done by him, or Sharpe, except the mortgages, and assign to her the unexecuted agreements for sale of the lands sold.

The action will be dismissed with costs as against the defendant Midwinter. The defendant Midwinter is entitled to specific performance of the agreement of purchase of the lands bought by him from Sharpe against the defendant Gunn, and there will be judgment accordingly, with costs of counterclaim.

The defendant Gunn is entitled to add his costs of suit to the amount found by the Master as due from the plaintiffs to the Sharpe estate, including the costs recovered against him by Midwinter upon his counterclaim.

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MANITOBA.

APRIL 19TH, 1907.

COURT OF APPEAL.

COUCH v. MUNICIPALITY OF LOUISE.

Highway—Non-repair — Injury to Horses — Municipal Act, sec. 667 — Construction of — "Portion of Road on which Work Performed" — Adoption of Road by Municipality— Obstruction—Notice of—Liability of Municipality.

County Court appeal.

On the evening of 24th September, 1904, a servant man of plaintiff, while driving a team of plaintiff's horses along a road allowance, ran into a barbed wire fence which had been constructed partly across the road, the result being that one of the horses was killed and the other severely injured. This action was brought against the municipality having jurisdiction over the road allowance where the accident happened, and against James C. Fleming, the person by whose instructions it was alleged the fence was erected, to recover damages for the loss and injury.

The County Court Judge before whom the action was tried entered a verdict against both defendants for $150. From this verdict both defendants appealed, the defendant Fleming on the ground that the evidence did not shew that the fence had been erected by his instructions, and the municipality on the ground that the case was not brought within the statutory liability imposed by sec. 667 of the Municipal Act, R. S. M. 1902 ch. 116.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.

J. S. Hough, K.C., for defendants.

A. McLeod, for plaintiff.

At the close of the argument the Court expressed the opinion that, so far as the defendant Fleming was concerned, the appeal must be dismissed.

PHIPPEN, J.A.:—I am of the opinion that the appeal should be dismissed as against the municipality.

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The facts, respecting which there is practically no dispute, shew that the municipality had improved the road allowance running north and south between sections 23 and 24 and 25 and 26, township 4, R. 11, W.

The road allowance between 24 and 25 was impassable in its natural condition, because of a ravine running across it, north and south, about one-eighth of a mile west of the most easterly portion of section 24, and because of certain sloughs lying a few hundred yards east of the ravine, otherwise it was in fairly good condition as a natural road. The sloughs and ravine compelled a number of people who resided to the east of section 24 to make a considerable detour to reach Pilot Mound, their market town.

A number of these residents petitioned the municipality to open the road allowance between 24 and 25. The council considered this work too expensive, owing to the cost of bridging the ravine, but, on learning that the owner of the north-east quarter of section 24 would allow the people to travel on his land around the ravine, and that the sloughs could be filled in at a comparatively small cost, the municipality did the work necessary to fill in the sloughs. The road, except at the ravine where a detour was made, thus became passable from a point east of section 24 to the travelled road, running north and south, leading to Pilot Mound, and was thereafter used as a highway.

The liability of the municipality is statutory, depending on sec. 667 of the Municipal Act, which reads as follows:—

"667. Every public road, street, bridge, and highway, and every portion thereof, shall be kept in repair by the municipality within which it lies; and, on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default;

"(a) Provided, however, that the liability of such corporation shall be limited to that portion of the road on which work has been performed or public improvements made by the municipality."

Counsel for the municipality contended that "portion of the road" mentioned in sub-sec. (a) meant that exact part of the road upon which work had been performed. In my opinion, this construction is entirely too narrow. I think we must consider the facts with reference to the existing conditions in this province. It would be unwise to

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compel sparsely settled municipalities to improve every portion of the road allowances which Parliament, in providing for the survey of this country, has seen fit to reserve. There are many portions of these road allowances which, in this prairie country, are, in a state of nature, well adapted to the requirements of the district, without substantial improvements. In many cases the cutting of a grade or the filling of a slough would make a substantial road of some extent.

I think the portion of the road referred to in the statute is such section or part of the road allowance as any municipality by its improvements had adopted as a completed road. In my opinion also, the onus is on the plaintiff seeking to hold a municipality liable under this section, to shew that the municipality has by its action adopted or intended to adopt the road allowance at the point of the accident as a completed public highway.

Having shewn that improvements have been made by the municipality on a portion of the road, with the intention that it should thereafter be considered complete and open for traffic, the plaintiff has, in my opinion, brought the municipality within its statutory liability without shewing that improvements were made at the exact point of the accident.

In the present case the evidence shews that the municipality in making the repairs did so to complete a through highway between sections 24 and 25, excepting at the particular point where the divergence was necessitated by the ravine. It shews that the municipality did this work for the express purpose of allowing the settlers living to the east of section 24 to travel along this road to and from the improved highway to the west of that section, and that it was not the case of a partly completed work looking to the ultimate opening up of a particular section of the road, the accident happening beyond where the work was done, but that on the completion of the work done the municipality believed that, apart from the ravine, the road allowance between sections 24 and 25 was reasonably fit for traffic. In other words, the evidence to my mind discloses that the municipality treated the road allowance between 24 and 25, excepting the portion at the ravine, as one section of road which, upon improvements being made at the sloughs, would be suitable for travel; and that it made these improvements as the work necessary to complete such section, which was

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thereafter, to the knowledge of the municipality, used as a public road. Such being the case, I hold that the road allowance at the point of the accident was a portion of a public highway on which work had been performed by the municipality.

The obstruction was placed on the road more than three months before the accident. There is so evidence of direct knowledge by the municipality of its existence, but I think, considering the season of the year as that at which the road repairs would naturally be made, and the length of time during which the fence remained on the road, we must impute notice of its existence to the municipality.

I would therefore dismiss the appeal with costs.

RICHARDS and PERDUE, JJ.A., concurred.

HOWELL, C.J.A., dissented.

MANITOBA.

MACDONALD, J. APRIL 25TH, 1907.

CHAMBERS.

CANADA PERMANENT MORTGAGE CORPORATION v. EAST SELKIRK SCHOOL DISTRICT CORPORATION.

Mandamus—Judgment against School District Corporation—Execution—Notice to Treasurer of Municipality to Levy Rate to Pay Judgment—Failure to Comply—Excuse for—Service on Predecessor in Office—Want of Knowledge—Levy.

Motion by plaintiffs for an order of peremptory mandamus, commanding the treasurer of the rural municipality of St. Clements, Manitoba, to levy a rate upon the land liable to be assessed for the same to cover the amount of the execution issued in the above action in the hands of the sheriff of the eastern judicial district.

A. C. Ewart, for plaintiffs.

F. Heap, for the treasurer.

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MACDONALD, J.:—It is proven that the sheriff complied with the provisions of the Public Schools Act, R. S. M. 1902 ch. 143, in his efforts to realize under the execution.

The treasurer of the municipality in which the defendant school district is situate was served with a precept to levy a rate, issued by the sheriff, on 23rd August, 1906. The treasurer at that time was W. R. Young; he resigned his position as treasurer on 29th October, 1906, and Thomas Bunn was appointed.

The general tax roll of the municipality was made out by Bunn and finally completed in the month of November, 1906, without the levy commanded by the precept issued by the sheriff being included.

The treasurer's explanation of such omission is not a satisfactory one. He says that he had no knowledge of the proceedings against the municipality until about 13th March, 1907, but admits a knowledge of the judgment.

Bunn was a member of the council of the municipality during the year 1906, and, if he had no knowledge of the action of the sheriff in the proceedings to realize under the execution, he should have had such knowledge, and the negligence, inability, or improper conduct of his predecessor in office, and at a time when he was a member of the council of the municipality, is no excuse for disobedience to the sheriff's precept.

Several objections are taken to the granting of an order for mandamus, and they were all very forcibly argued by Mr. Heap, counsel for the treasurer.

The first and most important objection is, that the treasurer is persona designata, and that the present treasurer cannot be ordered to comply with the precept served upon his predecessor. I do not think that this objection can prevail; the order is directed to the office, not to the individual; and to hold that the treasurer was persona designata, and that, therefore, his duties would not devolve upon his successor, would mean that a municipality so disposed could successfully evade payment of judgments recovered against it.

The other objections were principally to the effect that the treasurer cannot obey a mandamus and levy a rate to satisfy the execution because of some preliminaries which are imperative by other officers of the municipality, over which he has no control, before he can make a levy.

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In London and Canadian Loan and Agency Co. v. Rural Municipality of Morris, 9 Man. L. R. 377, it was held that "even if the sheriff would have been unable to strike the rate and arrange for the necessary levy the same year, as required by the statute, that would be no reason for refusing the writ, for mere inability to obey the writ has not, in all cases, been considered a sufficient reason for refusing it."

I think this principle must be applied to the case under consideration, and I grant the order for peremptory mandamus, together with costs.

BRITISH COLUMBIA.

(VICTORIA.)

FEBRUARY 22ND, 1907.

FULL COURT.

McMEEKIN v. FURRY.

Contract—Sale of Mineral Claims—Interests in Proceeds—Conflicting Evidence—Division of Proceeds of Sale—Statute of Frauds—Signature to Contract—"Party to be Charged"— Partnership—Ratification—Estoppel — Conditional Agreement.

Appeal by defendant Ira Furry, administrator of the estate of Oliver Furry, from judgment of HUNTER, C.J., ante 168, in favour of plaintiff in an action for a declaration of the rights and interest of plaintiff and defendants in certain mineral claims, and for a partition or sale thereof.

The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

Joseph Martin, K.C., for appellant.

E. P. Davis, K.C., for plaintiff and the other defendants.

IRVING, J.:—The late Oliver Furry in his lifetime, in particular in July, 1903, and from then until his death, claimed by virtue of a writing dated 20th May, 1899, and given to him by Leopold Boscowitz, to be the owner of an

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undivided non-assessable one-half interest in three mineral claims, namely, the Empress, Victoria, and Queen, which then formed part of the Empress group of mineral claims.

Leopold Boscowitz, on the other hand, contended that Furry had on 20th June, 1900, relinquished the above mentioned half interest for something which amounted to a one-fifth assessable interest in the said three claims and the Barbara mineral claim, also part of the Empress group, and certain other claims which were or which might afterwards be brought into the Empress group.

In consequence of these disputes, an action was commenced in January, 1905, by McMeekin, who was the holder of an interest in the three said claims, against Furry, Turner, Leopold Boscowitz, Joseph Boscowitz, David Boscowitz, and F. M. Leonard, also interested in the said claims, in order that the rights of the plaintiff and defendants in and to the said three mineral claims and also the Barbara claim might be declared, and for a partition or sale of the said claims.

Before the pleadings were closed, Oliver Furry died, and Ira Furry, the administrator, was substituted in his place.

In an amended counterclaim set up by Ira Furry he asked that it should be declared that his interest in the said three claims was an undivided one-half interest.

The case put forward by the three Boscowitz and the plaintiff in oposition to this counterclaim was the matter discussed in the argument before us. Their contention is that on 2nd June, 1900, when the property in the said three claims was vested in David, Leopold and David met Furry in Vancouver, and Leopold arranged with him that he should surrender the one-half non-assessable interest in the said three claims which he had acquired by virtue of the document of 20th May, 1899, and accept in lieu thereof a one-fifth interest in the proceeds to be derived from the said three claims and from the Barbara mineral claim and three or four other claims constituting the Empress group. This agreement, they say, was carried into effect by the document of 2nd June, 1900, and in their reply to the counterclaim they set up secs. 50 and 130 of the Mineral Act and the Statute of Frauds.

Furry, in his turn, to defeat the operation of the document of 2nd June, 1900, claims the benefit of sec. 50 of the Mineral Act and also of the Statute of Frauds.

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The Chief Justice, who was the trial Judge, found Leopold a most unsatisfactory witness, but thought that the weight of evidence preponderated in favour of the view that Furry had accepted the declaration of trust which was created by the document of 2nd June, 1900, and that therefore Furry's estate was entitled to the 20 per cent. and not the 50 per cent. interest. He gave judgment accordingly, and condemned Furry's estate in all the costs of the plaintiff's action and the counterclaim, and ordered him to pay the other defendants their costs of the defence and of the counterclaim. From that order the administrator appeals, on the ground that the Chief Justice was wrong in his facts as well as in his law; in any event he should not have condemned Furry to bear the whole expense of the litigation.

It appears beyond question that Leopold gave to Furry the two documents of November, 1898, and May, 1899, purporting to give Furry a non-assessable half interest in the three said claims. It is also established beyond doubt that in June, 1900, a two-day conference did take place between Furry and Leopold and David, in which the question of Furry's surrendering his 50 per cent. interest in the three said claims for the 20 per cent. interest was discussed; that at that time all three claims were vested in David, the Barbara claim only being vested in Leopold; that on 2nd June Leopold, David, and Furry went to the office of Messrs. Davis, Marshall, & MacNeill, and there the document of 2nd June, 1900, which had been previously prepared under the direction of Leopold, was read over and explained to Furry by Weart. Weart says the explanation was that it was a gift to him from Leopold of a 20 per cent. interest, and nothing was said as to its being a reduction from 50 per cent. to 20 per cent. Weart says he did not know that Furry was surrendering anything. The document was executed by Leopold, whether in duplicate or not is not clear, but the original, or, if executed in duplicate, one of the originals, was retained by Leopold. A copy (or the duplicate) may have been taken away by Furry, but the evidence on this point is contradictory. Immediately afterwards, viz, on 11th July, 1900, David transferred to Leopold the three said claims, and Leopold then proceeded to deal with them as follows. On the 11th he gave a one-fifth interest to David; on the 13th he executed a declaration of trust in favour of Seifert as to fifteen one-hundredths; on the 13th he trans-

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ferred to one H. C. Walters a fifth interest; and on the 16th he made an arrangement with the defendant Turner as to one-eighth. These allotments and the expenditure of $8,000, which Leopold then made, it is said, are only consistent with the theory that Furry had agreed to accept a one-twentieth interest, but it may be observed as to the $8,000 that he might have expended that sum even if the original agreement between him and Furry still remained in force, as under the original arrangement Leopold was to advance all the money necessary to develop the claims.

Furry, who was examined for discovery, says that he never executed nor accepted any agreement in reduction of his one-half interest; that he never went to the office of Davis, Marshall, & MacNeill, but at the same time he admits that Leopold wanted him to reduce his interest to 20 per cent., and that, had Leopold constructed a trail up South Valley to the mine, he might possibly have accepted the proposed reduction.

Furry's evidence does not satisfy me that he was perfectly frank when being examined. Underlying the whole of his evidence is an acknowledgment that there was an arrangement between him and Leopold by which possibly under certain conditions he would accept the reduction proposed. There are expressions used by him that convey to me the idea that he thought there was reserved to him the right to accept the document of 20th June, 1900, if he was satisfied with what Leopold was doing, or to reject it, as he did, if he thought fit. I refer to his evidence, p. 218, as put in by Mr. Bowser.

Before referring in detail to the evidence on the other side, it may be convenient to call attention to the fact that this really is a claim against a dead man's estate. Nominally the administrator is the plaintiff in the counterclaim, but a perusal of the pleadings will shew that the action is really by Leopold Boscowitz and his assigns to enforce the document of 2nd June, 1900.

Our Evidence Amendment Act, 1900, enacts (sec. 52) that "in any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the

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deceased person, unless such evidence is corroborated by some other material evidence."

Prior to the passage of this Act it was a rule of prudence as distinguished from one of law, that this Court would not act upon the uncorroborated testimony of claimants to the property of deceased persons, unless convinced that such testimony was true. If the evidence given by the living man brought conviction to the tribunal which had to try the case, that was sufficient, although, said Sir J. Hannen, "it is natural that in considering the statement of the survivor we should look for corroboration in support of it." See on this point In re Garnett, 31 Ch. D. 1, where Brett, M.R., said: "The law is that when an attempt is made to charge a dead person in a matter in which, if he were alive, he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion."

Having regard to that rule, I think the defendants to the counterclaim have failed to establish that Furry did agree to accept the document of 20th June in substitution for the former document. There are two or three things that seem to me unexplainable. Why was the document executed by Leopold, who was not the recorded owner of the three claims? If Furry accepted, why was not his signature obtained? Why was it that Leopold or David Boscowitz, who was then the recorded owner of the three claims, did not get back from Furry the documents of November, 1898, and May, 1899, or why did not Leopold put on record the document of June, 1900? Furry, it must be remembered, was in possession of the document of May, 1899, and held it until 10th April, 1901, when he recorded it. From all the facts that are given in evidence, I cannot help feeling that Furry was of opinion when he left Mr. Weart's office that the reduction agreement of June, 1900, was to come into force upon certain disbursements being made by Boscowitz, including the construction of the trail up the south valley. The drawing up and signing the document of 20th June, 1900, by Leopold, was only a step towards the reduction to which he had not yet consented; Furry might well feel that, as he had signed nothing, he was not bound. The evidence of David Boscowitz is to the effect that Furry was quite satisfied with the arrangement. He may have

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seemed quite satisfied—but what was the arrangement? Did he regard this as a transfer of 30 per cent. of his interest? Weart's evidence is consistent with the conclusion I have reached. Weart says he never understood that Furry was parting with any interest. Apparently he was ignorant of the fact that David was the recorded owner of the three claims. As to Turner's evidence that Furry had told him that he had accepted the reduction, we know that of all kinds of evidence that of casual declarations is the weakest and most unsatisfactory. Words spoken are liable to be mistaken and misremembered, and their meaning is liable to be misrepresented and exaggerated. Furry's action of 11th April, 1890, is quite inconsistent with the story told by Leopold.

Now it is for Boscowitz to prove that there was an out and out acceptance by Furry of the reduction of 20 per cent.; that their minds were ad idem. I am not satisfied with the proof offered.

It will be remembered that Furry gave his evidence on discovery some time before the trial. At the hearing the following questions were put to Leopold. . . . .

It is not possible for me on this evidence to come to the conclusion that Boscowitz and Furry were agreed on 20th June that the document of that date should govern their relations in place of the previous document.

It is admitted that the document of 20th June should have included certain other claims, either staked or to be staked, also some land to be used apparently as a depot or landing place at the foot of the trail, also provision should have been made as to doing assessment work upon the claims. The document of 20th June mentions none of these. It is extraordinary that so many inducements should have been omitted if Weart understood that he was drawing up a document for the surrender of an interest by Furry.

For these reasons I am not able to agree with the conclusion reached by the learned Chief Justice.

Now, assuming that the one-half interest claimed by Furry was vested in him by the document of 20th May, 1899, recorded 10th April, 1901, I do not see how the defendants can get over sec. 50 of the Mineral Act. That section enacts: "No transfer of any mineral claim, or of any interest herein, shall be enforceable unless the same shall

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be in writing, signed by the transferrer or by his agent in writing, and recorded by the Mining Recorder."

Are not the defendants to this counterclaim trying to enforce the transfer of a one-thirtieth interest from Furry to Boscowitz?

There remains the question whether the document of May, 1899, signed by Leopold with the signature "J. L. Boscowitz & Sons," at a time when one only of the three claims was in the possession of Leopold, is, in view of sec. 130, and the Statute of Frauds, and sec. 50 of the Mineral Act, sufficient to give Furry a claim to any of the mineral claims.

Section 130 was passed in consequence of the decision in Wells v. Petty, 5 B. C. R. 353. It is intended to prevent the locator being divested of his interest unless there is a written document. The section can have no application, as it is admitted in par. 2 of the amended reply that Furry located these three claims. In my opinion, the document of May, 1899, is not touched by sec. 130.

As to sec. 50 and the Statute of Frauds: the signature "J. Boscowitz & Sons" Leopold says he intended as his own. That being so, no question arises as to the Queen claim which stood in his name. Cf. Re Central Clondyke Mining Co., 5 Manson 336, where a person who applied for shares under an alias was held estopped from denying his liability as a shareholder.

As to the other two claims recorded in the names of Joseph and David, Leopold says these names were merely used by him, as he knew that he could rely on them to reconvey to him whenever he wished. As a matter of fact they did convey back to him, and under the circumstances Leopold is precluded from denying that he was their agent to sign for them. Further, David stood by on 2nd June and permitted Leopold to say that the agreement of November, 1899, was valid. Again, the estate which Leopold acquired in the Empress and Victoria by the conveyance by them at a subsequent date feeds the estoppel, and Furry became entitled as if Leopold had himself originally possessed the interests which he represented he had a right to assign by using their names.

The agreement of 20th May, 1899, "We hereby agree to give," etc., in the opinion of the Chief Justice, conferred

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on Furry no legal interest, but merely a right in equity to a conveyance of the half interest.

This document, in my opinion, was two-fold; it gave an equitable interest, which took effect at once. It also expressed a promise (quite unnecessary) to convert that equitable estate into a legal estate by the necessary documents.

The lands and interests therein being specified, the agreement was no longer merely executory. It was, in fact, a conveyance of a one-half interest to Furry.

In Cruise's Digest, vol. 4, at p. 376, the difference between a covenant relating to lands of a certain value and a covenant dealing with particular lands is pointed out. The first is a general covenant and does not bind any particular lands, but the latter is a specific covenant and binds the lands mentioned. Boscowitz, having on 20th May, 1899, specified the lands, thereby gave a one-half interest in the claims.

In my opinion, the judgment should be reversed and the administrator declared entitled to the one-half interest in the said three claims, with costs here and below.

MARTIN, J.:—A number of difficult questions are raised on this appeal, and not the least difficult (and the most generally important) is the first to be decided, viz., is the signature "J. Boscowitz & Sons," placed by Leopold Boscowitz at the end of the document which is the foundation of the defendant Furry's case, sufficient to satisfy the Statute of Frauds? Is it, in other words, "signed by the party to be charged?" I have examined with great care all the authorities cited and a great number of others in the Courts of Canada, as well as in England and Ireland, and some American authorities, but have been unable to find a case resembling the peculiar facts of this one, which raises, when thoroughly understood, a new and distinct point. Here the "party to be charged" did not sign the document in his own name nor as the agent of any other person. His own individual signature was rejected by Furry, who had staked the three claims in the separate names of Leopold Boscowitz, his brother David, and his father Joseph, one in each name, but without the authority or even knowledge of any of them Furry thought that, if he got the document signed "J. Boscowitz & Sons," he could bind all the interests in the claims, and so refused to take Leopold's personal signature. Leo-

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pold without any authority as agent or otherwise was prepared to sign the others' names, trusting to their ratification. This is the case, therefore, of a deliberate incorrect signature, and no element of mistake, uncertainty, or lack of identification, enters into it. Can a document be said to "be signed by the party to be charged" when he intentionally uses a signature other than his own, with the knowledge that it can at that time have no legal effect as regards those he purports to bind?

The leading cases on the mode of signature are well collected in Leake on Contracts (1906), pp. 183-6, and the sufficiency thereof ranges from that of a party writing surnames in the third person, to the use of initials. Nor does the position of the signature in the document affect its sufficiency, for it has been decided that the signature as a witness of one who was the vendor's agent does not restrict its larger application: Wallace v. Roe,[1903] 1 Ir. Ch. 32; Welford v. Beazley, 3 Atk. 503; and see Jones v. Victoria Graving Dock Co., 2 Q. B. D. 314, at pp. 323-4. But in all the cases cited the defendant used his true name or that which related to him alone, or enough of his own name to leave the question merely one of identification—such as, in certain circumstances, the printed bill head used in Schneider v. Norris, 2 M. & S. 286, which decision was for a long time questioned as going too far. In Lobb v. Stanley, 5 Q. B. 574, where "Mr. Stanley" was held sufficient, as "Mr. Ogilvie" long before (1817) in Ogilvie v. Foljambe, 3 Mer. 32, had been, Lord Denman said: "It is a signature of the party when he authenticates the instrument by writing his name in the body. Here, it is true, the whole name is not written, but only 'Mr. Stanley.' I think more is not necessary." The distinction between that and this case is obvious and twofold: first, the signer herein did not write his own name, and second, he did not intend to. In Durrell v. Evans, 31 L. J. Ex. 337 (explained in Murphy v. Boese, 44 L. J. Ex. 40), the expressions of Blackburn, J., which were much relied on, all presuppose the true name, so far as it went, being written as it was in that case—"Messrs. Evans." The learned Judge says: "If the name appears on the contract and be written by the party to be bound or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient." The context and authorities cited by the learned Judge

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shew that the point now under consideration was not and could not have been present to his mind. The question was one of the authority of the agent to bind the principal, and, as the learned Judge says: "In order to do this it is essential that there should be a signature made by an agent authorized to make it. Now 'Messrs. Evans' was written by Noakes at the top of the document."

It is clear that a signature consisting of descriptive words of ceremony is not sufficient. That was decided in Selby v. Selby, 3 Mer. 2, wherein the Master of the Rolls (Sir. W. Grant) held that a letter addressed to "My dear Robert" and signed "the most affectionate of mothers" was insufficient. He said: "It is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations it prescribes. It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing, that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name—such as a person unable to write making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word 'I' or 'me' would be enough, provided you can prove the handwriting."

The principle conveyed in this language applies, to my mind, with great force to the case at bar, and here the writer cannot be identified other than as one who performed a physical act, because there was no such firm in existence as J. Boscowitz and Sons, nor any individual or collection of individuals using that signature. It is manifest, therefore, that Leopold Boscowitz did not sign the document as "the party to be charged" individually, and it is equally clear that, since he was admittedly not "lawfully authorized" to sign for the others, they are not bound. This is well illustrated by the case of Graham v. Mosson, 8 L. J. C. P. 324, decided by the four Judges in banc. There it was alleged that the traveller of the plaintiffs, doing business under the firm name of North, Simpson, Graham, & Co., or North & Co., had by an entry in the defendant's book bound him

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under the statute, but it was held he had not, because, as Tindal, C.J., says: "There was no authority given to the traveller . . . to act as agent of the defendant . . . Dyson was not the agent of Mosson; the latter did not intend he should be his agent, or act in such capacity. In my opinion, the exceptions out of the statute should not be extended, and the rule for entering a nonsuit should be made absolute." Vaughan, J.: "I am of the same opinion. We should take care not to open the door to those perjuries which it was the object of the statute to prevent . . . The name of Dyson is not alleged to be that of the principal, but of the agent properly authorized. . . The plaintiffs have failed in the outset. They have not shewn distinctly, as they ought, that Dyson was the agent of Mosson." And the other Judges, while recognizing that the agent if authorized could bind his principal by signing his own name, took the same view, noting the possibility of Dyson having "made himself personally liable" by his incautious mode of inserting his name in the contract.

This decision was followed by the same Court in another action wherein the same firm were plaintiffs—Graham v. Fretwell, 11 L. J. C. P. 41.

Now in the case at bar no authority was, as has been mentioned, given, or, in the circumstances, could have been given, by these various independent claim-owners to Leopold to represent him in any way, nor as David Boscowitz's evidence shews, was there any firm or individual in existence represented by the signature which Leopold deliberately appended to the document after his own had been refused, which signature he did not intend to be taken as his individual signature, nor as an attempt to write it.

But all the authorities cited and all the remarks of the learned Judges in them, without exception that I can find, proceed upon the assumption that the party to be charged must sign and has in fact signed (by writing, printing, or stamping) the document, either with his full name, or with some signature more or less full, that he intends shall represent it. Such being the case, the position of affairs in the present case is equivalent to that in Selby v. Selby, viz., that the signature amounts to nothing, and in the eye of the law there is no signature. This Court cannot here patch up a valid signature by striking out all the words except

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"Boscowitz," and so leaving it as a question of identification, yet that is practically what it must do to support the defendant Furry's contention, which would be doing what Mr. Justice Vaughan said the Court should take care not to do; and, as Lord Justice Fitzgibbon said in Dyas v. Stafford (1882), L. R. 1 Ir. Ch. 521, a defendant who succeeds on the Statute of Frauds is not "to be regarded as an unmeritorious litigant."

I have not overlooked the cases on wills that were cited, but they do not give much assistance, for they largely proceed upon a different principle. Pryor v. Pryor, 29 L. J. Prob. 114, however, may be noted as an example of a witness signing a wrong name by intention, and consequently probate was refused, Sir Cresswell Cresswell saying: "I am not aware of any case in which an attestation has been held sufficient in which the party subscribing has not intended by the name subscribed or by the mark to represent his or her own signature. Now in this case the deceased desired that the will should have the appearance of having been attested by the husband instead of the wife, and the signature was written as the signature of the husband. It would produce great inconvenience to permit persons to sign any name they pleased and to hold that such signature was good."

At the same time, if the all-important intention to sign correctly is present, the Court of Probate will endeavour to uphold it, as witness the case of In the Goods of Sperling, 3 Sw. & Tr. 272, where a descriptive signature was held to be sufficient, the witness having misunderstood the solicitor's instructions.

Some discussion arose on the question as to whether or no the interest of a free miner in his claim is "an interest in land," and I am clearly of the opinion that Mr. Martin's contention to that effect is correct: see Williams Creek Bed Rock Flume Co. Ltd. v. Symon, 1 M. M. C. 1; Wells v. Petty, 1 M. M. C. 147, 5 B. C. R. 353; Stussi v. Brown, 1 M. M. C. 195, 5 B. C. R. 380; Fero v. Hall, 1 M. M. C. 238, 6 B. C. R. 421; Sunshine Co. v. Cunningham, 1 M. M. C. 286; and sec. 2 of the Mineral Act, definition "mine" and "mineral claim." Cf. also Brown v. Spruce Creek Power Co. Ltd., 2 M. M. C. 254, at p. 266.

The result is that on all the said authorities I am of the opinion that Furry's case fails on the Statute of Frauds, and

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that consequently he has no interest in the said mineral claims.

His appeal therefore must be dismissed.

Then as to costs. The judgment directs the defendant Furry to pay the whole costs of the action both of plaintiff and of the other defendants, and it is contended that this direction is erroneous in principle and goes too far. In my opinion, this contention is correct, though the matter is unusually complicated and difficult to decide with precision. The order should have been that the defendant Furry do pay to the co-defendants and the plaintiff all costs of and occasioned by the counterclaim, and also pay to the plaintiff the costs of his action as against Furry, because, by par. 16 of the statement of defence, Furry in effect claimed a priority which he has failed to establish. It was, I think, with every respect, an error to relieve the other defendants of their share of the general costs of the action, and make Furry pay them, because, as originally framed and launched, it would have to have been brought irrespective of Furry's contention.

Therefore on this issue of costs, I think the appeal should be allowed.

CLEMENT, J.:—I agree with the Chief Justice that Oliver Furry did agree with Leopold Boscowitz in June, 1900, to reduce his interest in the Empress, Queen, and Victoria mineral claims from a half interest (non-assessable) to a 20 per cent. interest in those claims and certain additional fractions; but an anxious consideration of the evidence leaves the conviction strong upon my mind that this agreement was conditional upon the performance by Leopold of certain active work in connection with the claims which he in fact never performed. It stands out clearly upon Leopold's own evidence that the declaration of trust signed by him on 2nd June, 1900, does not embody all the terms of the arrangement; for he admits that, in addition to an interest in the Barbara Fraction, Oliver Furry was to have an interest in all the fractional claims which might go to make up the Empress group, as well as in the pack train and other assets. There was no reason suggested why an agreement should not have been drawn up and signed by both parties shewing all the terms, conditional or otherwise, of the bargain at which they had arrived; and when a written docu-

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ment is put forward signed by one only of the parties and embodying confessedly only part of the bargain, it seems to me that we are justified in holding Leopold to strict and precise proof that Furry accepted that document as presently and unconditionally operative to effect a reduction of Furry's interest. On the real point in controversy, namely, was or was not the agreement conditional, we derive no assistance, so far as I can see, from the evidence of David Boscowitz, Turner, or Mr. Weart. Oliver Furry's evidence is emphatic that the whole bargain was conditional upon Leopold entering at once upon the construction of a trail to open up the property, and his subsequent conduct was consistent with that view. Leopold, it is true, denies this, but he does say that during the two days throughout which the matter was threshed out between him and Furry, "we talked about the best way of running the property, the best way to build a trail," and again "there is no doubt we talked about trails." It further appears that at this time Leopold made a gift of a 15 per cent. interest to Saifort, "a sort of foreman for me," and of a 20 per cent. interest to Walters, who "was to have the management of the thing." All of which strongly tends to convince me that Leopold gave Furry to understand that a period of active development was about to be inaugurated.

The Chief Justice was evidently unwilling to decide the question of fact upon the oral testimony alone, and so had recourse, as he says, to the "inherent probabilities of the case," and it is here particularly that I cannot bring myself to agree with his views. "It is," he says, "in the highest degree unlikely that Boscowitz would have entered into such an agreement as alleged by Furry, that is to say, that he was to go to the expense of building this trail on the verbal promise of Furry that he would accept a reduction of his interest. It is, moreover, undeniable that just such a reduction of Turner's interest in the Britannia group occurred, to the knowledge of Furry. He was an illiterate man, without any means or any access to capital, while Boscowitz had; it would have been difficult if not impossible for any one to interest capital in these claims unless he could hand over a controlling interest; and at the time of the alleged reduction of interest the value of the claims was of a highly speculative character."

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In the first place, it was not necessary that Leopold should rely upon Furry's verbal promise to accept a reduction of his interest, for, as I have said, there was no reason why the whole agreement should not have been reduced to writing and signed by both parties. To my mind, the very fact that Furry was never asked to sign, and the further fact that not a suggestion seems to have been made to him at any time that he should surrender the earlier document of May, 1899, which clearly shewed his half interest, tend strongly to shew that the document of June, 1900, was not accepted by Furry as a presently operative instrument to effect a reduction of his interest.

Then as to the Turner reduction of interest in the Britannia group being a precedent which Furry would naturally follow, it seems to me clear that the cases were not at all parallel. That Turner could see no similarity between them is apparent; for when, as he says, Furry told him he had agreed to reduce his interest, he (Turner) called him an old fool. If indeed Furry thought that his agreement with Leopold was of the same character as the agreement made by Turner, he clearly must have expected that immediate development of the Empress group would be undertaken by Leopold. The fact was that the Britannia group had been taken hold of by capitalists, and Turner thought it a good speculation to accept a 20 per cent. interest in that about-to-be-worked group instead of $10,000, in cash. If, as I think, Leopold led Furry to believe that active development (the great desideratum in the early life of a mineral claim) was to proceed at once, I can understand Furry's willingness to accept a reduction; but I must confess I cannot see any other reason for it. The throwing in of outlying fractional claims does not strike me as any adequate reason.

Then again, in order to give Leopold control, i.e., the right to sell the whole property without regard to the wishes of his-co-owners, a reduction of Furry's interest was not necessary, nor would it be effectual to that end, unless, indeed, the enterprise were to be put into the shape of a joint stock company, of which there is not the faintest hint. With a 20 per cent. interest Furry could just as effectively block a sale as with a 50 per cent. interest; so that the control was given to Leopold (if at all), not by the reduction of Furry's interest, but by the specific provision that Leopold

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should have the absolute right to sell regardless of Furry's wishes.

In the view I take of the law governing this case, it was perhaps unnecessary to state my view of the facts at such length, but it is due to the Chief Justice that I should state clearly my reasons for differing (so far as I do differ) from his conclusions of fact; and the litigants, moreover, are entitled to know my view should the case go further.

On the law: assuming for the argument's sake that full effect should be given to the finding of fact by the Chief Justice, I am of opinion that both the Statute of Frauds and sec. 50 of the Mineral Act are a fatal bar to the enforcement of the document of 2nd June, 1900; and that, on the other hand, neither of them stands in the way of the enforcement of the earlier document of May, 1899, under which Oliver Furry took a half interest (non-assessable) in the Empress, Queen, and Victoria mineral claims.

To deal with this last question first. The Furry half interest under his document of May, 1899, is asserted in the plaintiff's statement of claim (para. 4), and is admitted by Leopold Boscowitz in his statement of defence (para. 2). If, nevertheless, he may now attack that document, I think his attack must fail. The only point taken against it, so far as the Statute of Frauds is concerned, is that it was not signed by the party to be charged therewith. It was signed by Leopold Boscowitz thus: "J. Boscowitz & Sons." The facts were that the three claims stood recorded in the names of Joseph, David, and Leopold Boscowitz respectively, and that "J. Boscowitz & Sons" correctly described and included them all. But the sole beneficial owner of the claims was Leopold, and he says positively that, realizing his sole ownership, he intended the signature "J. Boscowitz & Sons" as his signature. As a further matter of fact, Leopold afterwards got in what one may call the paper title; and, in my opinion, he cannot be heard to say that he was not the agent of Joseph and David so as to make the signatures theirs as well as his, if it were necessary to go that far. Moreover, he impliedly contracted with Furry, though he was their duly authorized agent (Starkey v. Bank of England, [1903] A. C. 114, 72 L. J. Ch. 402), and should therefore make good to Furry any loss in interest which the latter might suffer by reason of his absence of authority to bind Joseph and David.

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What then was the effect of the document? The Chief Justice says that it gave Oliver Furry no legal interest, but "only a right in equity to a conveyance of the half interest." With all deference I cannot concur in this view. The still earlier document of November, 1898, uses the words "we hereby give," and the later document of May, 1899, was not intended in any way to weaken the operative effect of the earlier, but was intended merely to make specific mention of the claims covered by the general words of that earlier document. The words "we hereby agree to give" in the later document must, therefore, I think, be held to be words of present transfer: see Hoofstetter v. Rooker, 22 A. R. 175; and Leopold was estopped from saying otherwise. The estoppel was fed when Leopold afterwards got in the "record" title, following upon which Furry duly recorded the transfer. In this view we have here an attempt to enforce in the teeth of the 50th section of the Mineral Act an instrument which, if effective at all, must be effective as a transfer from Furry of a 30 per cent. interest in certain mineral claims, and which is not signed by the transferror nor recorded.

But, even if the agreement of May, 1899, is to be treated as an executory, and not, as I think it is, an executed, contract, the right in equity to a conveyance, as the Chief Justice puts it, is an interest in land within the Statute of Frauds. In my opinion, the interest of a free miner in his mineral claim is an interest in land, and it can make no difference, so far as the Statute of Frauds is concerned, whether that interest is legal or equitable: see Kelly v. Webster, 12 C. B. 283, 21 L. J. C. P. 163; In re Whiting, 10 Ch. D. 615, 48 L. J. Bkcy. 79.

That an executory agreement in writing satisfying the Statute of Frauds may be absolutely waived and abandoned by parol seems to be the law: see Robinson v. Page, 3 Russ. 114. "But such defence must be established with the greatest clearness and precision, and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into:" Robinson v. Page, ubi supra; and see also Price v. Dyer, 17 Ves. 356. Here there is no case, either on the pleadings or the facts, of a total abandonment of the agreement of May, 1899. All that is alleged is that that agreement "was subsequently varied by a document under seal dated the 2nd day

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of June, 1900, whereby the interest of Furry . . . was reduced and changed," etc. Such a document, not signed by Oliver Furry, and so not satisfying the Statute of Frauds, cannot be set up to defeat, vary, or modify Furry's rights under the agreement of May, 1899: Price v. Dyer, ubi supra; Noble v. Ward, L. R. 2 Ex. 135, 36 L. J. Ex. 91; Goss v. Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127; Hickman v. Haynes, L. R. 10 C. P. 598, 44 L. J. C. P. 358. The proof which the Statute of Frauds renders indispensably necessary is not forthcoming: see Maddison v. Alderson, 8 App. Cas. 473, 52 L. J. Q. B. 737.

Nor do I see any justification for treating this as a case of accord and satisfaction, for the document of June, 1900, is still executory: in other words, assuming a broken obligation under the agreement of May, 1899, there may have been accord, but there certainly has been no performance of the later agreement accepted in satisfaction of the earlier: see Bayley v. Homan, 6 L. J. C. P. 309; Gabriel v. Dresser, 24 L. J. C. P. 81; Smith v. Trowsdale, 23 L. J. Q. B. 107.

If it be argued that the obligation under the later document was accepted in lieu of the obligation under the earlier, the short answer is that the later document cannot be enforced against Furry by reason of the Statute of Frauds, and so the earlier must stand: Noble v. Ward, ubi supra. Lord Blackburn in Maddison v. Alderson, ubi supra, speaks of the established rule "that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged."

At the trial all parties united to storm the Furry position, apparently leaving all questions inter se open. At all events, no argument was addressed to us on any question other than the question of the Furry interest. I think, therefore, we should merely set aside the judgment pronounced at the trial, declare the defendant Ira Furry, as administrator, etc., entitled to a half interest (non-assessable) in the Empress, Queen, and Victoria mineral claims, and reserve liberty to all parties to apply. The defendant Ira Furry is entitled to his costs of the action and of this appeal.

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BRITISH COLUMBIA.

(ROSSLAND.)

CLEMENT, J. MARCH, 1907.

TRIAL.

FOX v. PETERS.

Costs—Scale of—Amount in Controversy — Jurisdiction of County Court—"Good Cause" for Depriving Plaintiffs of Full Costs.

Plaintiffs commenced this action in the Supreme Court to recover from defendant $720.81, balance due on a promissory note. The County Courts having jurisdiction over claims of this nature up to $1,000, counsel for defendant contended that costs should be on the County Court scale, and that Rule 976 of the Supreme Court Rules, passed subsequently (by legislative enactment) to the Supreme Court Act, had the force of a statute, and overrode sec. 100 of the Supreme Court Act.

J. A. Macdonald, K.C., for defendant.

C. R. Hamilton, K.C., for plaintiffs.

CLEMENT, J.:—I can see no good reason for bringing this action in the Supreme rather than the County Court, and, in my opinion, the absence of such good reason is "good cause" for depriving plaintiffs of full costs.

Judgment for plaintiffs for amount claimed with costs on the appropriate County Court scale.

BRITISH COLUMBIA.

(VICTORIA.)

APRIL 11TH, 1907.

FULL COURT.

LEMON v. DUNSMUIR.

Mechanics' Liens—Material Men—Action to Enforce Lien—Payment or Satisfaction—Appropriation of Payment made by Contractor to Material Men with Owner's Money—Hardship upon Owner.

Appeal by defendant Dunsmuir from the judgment of a County Court in favour of plaintiffs in an action to enforce a mechanics' lien.

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The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

Peters, K.C., for the appellant.

W. C. Moresby, for the plaintiffs.

IRVING, J.:—The plaintiffs are millmen. The defendant Mesher was a contractor who had contracted to build a house for Dunsmuir, the other defendant.

The plaintiffs brought this action as against Dunsmuir for a declaration that they were entitled to a lien under the Mechanics' Lien Act against Dunsmuir's house for the sum of $986.50, the price of lumber supplied to Mesher during the months of August and September, 1906, and by him used in the construction of Dunsmuir's house.

The County Court Judge gave judgment in favour of the plaintiffs, and Dunsmuir now appeals from that decision.

On 1st August, 1905, Mesher had under contract several houses in different stages of construction; Mr. Dunsmuir's house was just commencel, others were almost completed.

Mesher at that time owed plaintiffs some $5,000. He had other creditors also. On 4th August, at a meeting of his creditors, explanation and statements were given by him, and an arrangement arrived at, by which it was hoped he would be able to carry on and pay his creditors. The plaintiffs were to continue to advance him lumber, and he promised that all supplies, including, of course, lumber, would be paid for by him in cash, monthly, that is to say, he was to pay for all supplies received during one month on the 15th day of the following month.

At this meeting, and at various times in July and August, before and after the meeting, Mesher told the plaintiffs that on 1st September he would receive on account of Dunsmuir's contract the sum of $2,000, and that out of that sum he would be able to let them have $1,000. The names of other persons from whom he expected to receive money were mentioned by him, and he made statements and promises from which plaintiffs were led to expect that he would be in a position on 1st September to pay them on general account some $3,500.

On 1st September Mesher did not turn up, but on Saturday the 2nd he handed to the plaintiffs his own cheque for $1,000, without saying a word as to where the money came from, or as to its application. The defendant Dunsmuir asserts that this $1,000 was part of $2,000 paid by him to

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Mesher, and that it should have been, and actually was, appropriated by Mesher so as to satisfy the charges for lumber supplied to his house. The plaintiffs deny that there was any appropriation by Mesher, and say that, therefore, instead of applying it to Dunsmuir's account, and thereby releasing him from any risk of lien, they applied it as they previously applied all moneys paid by Mesher "just as we had been doing right along." It is concerning this application of the money that this present appeal has been taken.

On behalf of Mr. Dunsmuir it is contended that it was in fact on Saturday 2nd September applied by Mesher's express direction in payment for the material supplied for Mr. Dunsmuir's house, and that if not then applied, then by reason of agreement entered into at the creditors' meeting that all goods supplied during the month should be paid for in cash, there had been an appropriation by Mesher at that meeting to Mr. Dunsmuir's account for lumber supplied in August, and no express direction on Saturday morning was necessary. The fact that some $936 worth of lumber had been delivered at Mr. Dunsmuir's house during August gives some colour to this contention.

The rule relating to appropriation of payments as taken from the Roman law required, where no direction had been given by the debtor, that the payment should be appropriated to the most burthensome debt. The Court of Chancery in England adopted the rule, but the Courts of common law followed a different principle, and where no direction was given by the debtor allowed the creditor to apply the payments as he saw fit.

In Simson v. Ingham, 1 B. & C. at p. 72, Bayley, J., states the common law doctrine thus: "The general rule is that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific payment, then the right of application generally devolves on the party who receives the money."

The debtor's right must be exercised at the time the payment is made, or before. The creditor, on the other hand, is permitted to be more deliberate. He may exercise his right of election "up to the very last moment:" per Lord Macnaghten in The "Mecca," [1897] A. C. 286, 293; even in the witness box, as in Seymour v. Rickett, [1905] 1 K. B. 715.

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The County Court Judge has found that there was no appropriation by Mesher at the time of giving the cheque, but Mr. Peters contends that in reaching that conclusion the Judge overlooked the rule of law that permits the Court to hold that there may be an appropriation by the intention of the person making the payment without an express direction, as it is not necessary there should be a specific direction if the circumstances are tantamount to one, or if the intention is clearly indicated. He cites on this point Newmarch v. Clay, 14 East 234, where two notes of hand were given up. The taking back of these notes for cancellation was held to be sufficient appropriation without words.

Whether the intention of Mesher was sufficiently indicated on the morning of Saturday 2nd September or before, to constitute an appropriation of this $1,000 to the Dunsmuir lumber, is the question. In my opinion, it was not. Mesher at that interview said nothing whatever about the appropriation. Lemon did not know whence the money came. He only learned some days afterwards that Dunsmuir had paid this $2,000. At the interview on Saturday he reproached Mesher with not paying more, with not paying the promised $3,500, and Mesher promised to see him again on Monday.

But it is said that Lemon had in his pocket a slip of paper on which he had written the amount of the Dunsmuir account, less discounts for cash, and that at the end of the interview he handed this slip to Mesher. That is all true, but Lemon explains that this was a mere memorandum prepared for his own guidance when he should meet Mesher. In Simson v. Ingham, supra, Bayley, J., says: "Entries made by a man in books which he keeps for his own private purposes are not conclusive on him, until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit." Holroyd, J., at p. 74, uses similar expressions and goes on as follows: "The effect of making the entries in their own private books shews only that the idea of so applying the payments had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect."

So also in the case of The "Mecca," where an account was made up for the purpose of shewing what the balance

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was, and for no other purpose, it was held that such account did not constitute an appropriation.

At the trial and also on the appeal great prominence was given to this slip of paper, which, as I have already said, was prepared as a mere memorandum for Lemon's use in dunning Mesher. At the close of the interview, when Lemon was reproaching him for not making up the full $3,500, and pointing out that what he had given him was not sufficient to pay for the lumber supplied during August, which amounted to about $1,470, Mesher said: "How much is it? How much do I owe? How much is Dunsmuir's account, or what do I owe?" Thereupon Lemon produced this slip and said, "$900 and something." Mesher said, "Let me see," and put it in his pocket. This was after the $1,000 had been paid, and either just before or just after Mesher promised to see Lemon on Monday. I infer that this promise to see him on Monday was with reference to a further payment. With this account of the slip must be read Lemon's statement at p. 20: "I did not know till several days after (this interview) who had paid him (this $1,000)." It is said that the handing over of this slip to Mesher shews an appropriation, but, in my opinion, the circumstances all shew that the parties never addressed their minds to the subject of appropriation. Lemon was intent on getting money from Mesher. Mesher was anxious to get away from him—to stave him off until Monday. It is not at all unlikely that Mesher would rather encourage the idea that the Dunsmuir money was still available. But, without going so far as that, how could there be an appropriation unless Lemon was made aware either by express words or circumstances tantamount thereto of the name of the person by whom it was being paid?

Then as to the agreement entered into at the creditors' meeting when it was arranged that Mesher should pay cash. It is contended that this was an appropriation binding on Mesher and the plaintiffs and prevented them exercising their election.

In the first place, at that meeting there were promises made by Mesher to pay on the general account, as well as for the monthly supplies. Does any one suppose that Lemon, Gonnason, & Co. would continue to advance lumber for its bare cash value and renounce their chances of getting paid for the lumber already supplied? Their supplying him with

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lumber was to enable him to get money from those whose houses he was building and so pay off some of the arrears.

In the next place, assuming that it was to be applied to lumber supplied in August, Mesher did not say on whose account it was to be paid. It was suggested that there would be appropriation pro rata. That seems to me a most unreasonable arrangement—although in this particular case it would work out fairly well. This pro rata theory is quite inconsistent with that principle of natural equity upon which Mr. Dunsmuir's claim is entitled to favourable consideration. The strongest reason that can be advanced for holding that the circumstances of this case dispense with any express direction is that common fairness requires that Mr. Dunsmuir's money ought to be applied by Mesher in satisfying Mr. Dunsmuir's debt—or rather, in safeguarding him from a liability to a lien. Now the pro rata theory is based on the assumption that Mesher and Lemon had a right to enter into a bargain with each other to divert this money from its proper destination, and apply it in part satisfaction of debts in which Mr. Dunsmuir had no concern. I think that such an arrangement—if deliberately entered into—would be inconsistent with honest business methods. If there was any binding force in the so-called agreement, it must be that all moneys received from Dunsmuir should go to relieve him from any liability of a lien.

But, apart from these reasons, there was no binding agreement to apply the payments in that way. It was not a contract, nor does it constitute an estoppel. At most it was a mere expression of intention which Mesher was at liberty to refuse to carry out: Chadwick v. Manning, [1896] A. C. 231. If Lemon, Gonnason, & Co. had advised Dunsmuir that this arrangement had been entered into and would be carried out, then the matter might be different, but there is no suggestion of anything of the kind.

It was argued, but somewhat faintly, that what took place at an interview held in the middle of September between Lemon, Mesher, and Dunsmuir amounted to an appropriation, but it is clear that nothing that Mesher could then do would affect the question.

If Mesher received this money from Dunsmuir, it was his duty to apply it on Dunsmuir's account so as to prevent a lien being filed against Dunsmuir's property. When Mesher neglected to do this, I cannot see that Lemon was called upon

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to make any inquiry. There was nothing to suggest to him that this was Dunsmuir's money except the promise that he was to receive a portion of Dunsmuir's money, but he was also promised other moneys.

I think that we should not attribute bad faith to Lemon, Gonnason, & Co., without sufficient evidence to justify such a course. I can see nothing to suggest that Lemon, Gonnason, & Co. were acting in bad faith, or anything to make it reasonable or right that they should make further inquiries before appropriating the money as they might think proper. It is easy enough after the event, and after we have had an elaborate presentation of the case by counsel, to speculate what precautions Dunsmuir might have taken, or how Mesher should have safe-guarded him, or how Lemon, Gonnason, & Co. should have inquired of Mesher as to what appropriation he wished to make, but I do not think Lemon, Gonnason, & Co. were bound to occupy their minds with any such considerations. The law laid no obligation upon them to make inquiries as to the source of supply. The law has given them certain rights, and they have chosen to exercise those rights in the way that proves most beneficial to them. The case is one of hardship on Mr. Dunsmuir, but Lemon, Gonnason, & Co. were within their rights, and should be upheld.

For these reasons I would dismiss the appeal.

MARTIN, J.:—While I feel disposed to accede to the defendant's contention that where a mill-owner who is supplying lumber to the same contractor to construct buildings for different proprietors receives money from the contractor which the mill-owner knows comes from a certain proprietor, then and in such case the evidence of specific appropriation need not be so strong as it would otherwise have to be, yet I do not accept the further proposition that in said circumstances the onus is on the mill-owner to negative such appropriation. That to my mind would be going to a length for which no authority has been cited. In the present case, and on the particular facts, I can only reach the conclusion that there is not enough evidence to support the appropriation in favour of the defendant, in view of the important testimony given by the only independent witness, Keith, which is sufficient to turn the scale.

The decision of the County Court Judge should therefore be affirmed.

CLEMENT, J.:—Prior to his meeting Mesher on the Saturday morning, the slip in Lemon's pocket meant this: "Mesher

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owes us such-and-such a sum of money in respect of lumber supplied to Dunsmuir's house; if he pays this amount in cash, i.e., promptly, we will allow him a discount of so much." Delivered by Lemon to Mesher after receipt of the $1,000 cheque, it surely cannot be held to mean anything else than this: 'You (Mesher) owed us such-and-such a sum in respect of lumber supplied to Dunsmuir's house. As you have paid this account in cash, we have allowed you a discount of so much." Could Mesher, this slip in his hand, have parted from Lemon with any other belief in his mind than that the Dunsmuir account was paid? And could Lemon have any reasonable or even plausible ground for entertaining any other belief? Mesher had the first right to appropriate, and I am of opinion, with deference to those who would take a contrary view, that Lemon must be held to have known by irresistible inference from Mesher's actions that he, Mesher, had made his intended appropriation manifest: see Marryatts v. White, 2 Stark. 101. To accept Lemon's statement now in Mesher's absence, and against a third party, that the paper he delivered to Mesher does not really mean what it says, would, in my opinion, encourage business men to play fast and loose with commercial documents.

I would allow the appeal with costs, and dismiss the action as against Dunsmuir with costs.

Appeal dismissed; CLEMENT, J., dissenting.

[See British Columbia Mills Timber and Trading Co. v. Horrobin, ante 275.]

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

JOHNSTONE, J. MARCH 20TH, 1907.

TRIAL.

JACKSON v. JACKSON.

Partnership—Dissolution — Judgment against Partners — Contribution between Partners—Settlement—Mistake—Omission to Include Outstanding Liability—Setting aside Settlement—Accounting.

Action by Dema Jackson, formerly Dema Battel, against J. W. Jackson and James Maxwell, to recover the amount

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of a promissory note made by defendants to plaintiff for $306 and interest.

W. B. Willoughby, Moose Jaw, for plaintiff.

G. E. Taylor, Moose Jaw, for defendants.

JOHNSTONE, J.:—From the evidence given at the trial I can come to no other conclusion than that the moneys were advanced by the plaintiff to the defendants on the note of the defendants of which the note sued on is a renewal, and that the moneys lent on the security of the note went into the business of the defenlants.

There will therefore be judgment for the plaintiff against both defendants for $306, together with interest at the rate of 10 per cent. till due and at the legal rate thereafter.

As to the question of the respective rights and liabilities of the partners as between themselves, I have had some difficulty in arriving at a conclusion.

In October, 1906, an agreement was entered into for the dissolution of the co-partnership theretofore subsisting between the defendants as laundrymen in Moose Jaw.

By this agreement effecting dissolution the defendant Maxwell agreed to pay to his co-defendant $2,400, and to indemnify and generally save harmless such co-defendant from all outstanding liabilities of the firm, of which this note was one; but by common mistake the liability of the firm to the plaintiff was not taken into consideration at the time of settlement. I am unable to determine who should pay this debt, or whether both should contribute in equal shares towards its liquidation, without first setting aside this document and having the accounts taken between the partners.

In Pitt v. Clay, 6 Beav. 503, a case very similar to the one before me, there was one item wholly omitted in the settling of the accounts between the partners, and an action having been brought to rectify the error, which was a common one, it was held by the Master of the Rolls (although it had been contended that the matter as to the liability could be settled without reference to the release), that the release would first have to be set aside to enable the accounts to be opened. In delivering judgment His Lordship said (p. 506): "It was argued that the sum in question ought to be considered as entirely out of the agreement, and that the plaintiffs' right to their share of it ought to be treated as an

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entirely independent demand; but it does not appear to me that I ought to so consider it. If this sum had been known to both parties, it would have been treated as an item in the partnership accounts. I may presume that if, with the item in their view, they had been desirous to compromise the suit, the plaintiffs would have desired, and the defendant might have been willing to give, a larger sum than was actually paid to the plaintiffs; but what sum would have been required or given it is impossible for me to know, or even to conjecture. Various motives which induced the parties to compromise in the state of things which they supposed to be true, might have operated differently, or with different force and effect, if the existence of this item had been known; and, giving to the plaintiffs the benefit of the item in account, it appears to me just that both parties should, as far as it is now practicable, be restored to the situation in which they were before the agreement which is thus disturbed was made."

It appears that, after the agreement of dissolution was entered into, Maxwell mortgaged the late partnership property for $8,000, and that he is not now in a position to have this discharged or set aside, but should he be so and desire to have it set aside, I would be disposed to make the necessary order. There is no doubt whatever but that the omission to mention on the settlement the $306 and to take the same into consideration, was a common error. Both partners agree as to this.

I will therefore dismiss that portion of the defence which refers to the claim for contribution, without prejudice to the right of the defendant Maxwell to apply to set aside the agreement mentioned, and for further accounting.

NORTH-WEST PROVINCES.

(WETASKIWIN.)

SCOTT, J. MARCH 26TH, 1907.

CHAMBERS.

CUNNINGHAM v. CUNNINGHAM.

Alimony—Interim Order—Adultery—Means of Support.

Application by plaintiff in an action for alimony for an order for interim alimony.

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H. T. Harding, Wetaskiwin, for plaintiff.

M. E. O'Brien, Wetaskiwin, for defendant.

SCOTT, J.:—Plaintiff in her statement of claim alleges as her main reason for leaving her husband and living apart from him that he attempted to procure her to commit acts of adultery with one Frank Powers for money; that he made determined efforts to compel her to go to Stettler and keep a house of ill-fame; and that finally about 1st January, 1906, on a night when Powers was to stay all night in their house, plaintiff told her that he would prefer that she slept with Powers, and, on her refusing to do so, said that he had no further use for her, and that she might leave as soon as she could. She states that she then left as soon as she could make preparations therefor, the defendant taking her to the house of one Mrs. O'Connor, a neighbour.

In his affidavit filed on the application the defendant states that on 5th February plaintiff, against his wishes, left his home, informing him that she was going to Wardner, Idaho, and that one Jesse Franklin Powers would supply her with the necessary money; that she returned to Alberta in the month of March following, and went to the house of said Powers, which contained only one room, and there lived with him, and has ever since continued to live with him; that in January, 1906, she went with Powers to the village of Erskine, and remained at a hotel there, and, as defendant is informed and believes, they occupied the same room and the same bed, and that in the month of October last they together went to Stettler, where plaintiff gave birth to a child, of which defendant is not the father. None of these statements has been denied by plaintiff.

It appears to be well settled that, upon an application for interim alimony, the question whether the applicant has been guilty of adultery cannot be inquired into or considered unless it has been determined by judicial decision: see Campbell v. Campbell, 6 P. R. 128, and Holt v. Holt and Davis, L. R. 1 P. & D. 610. It appears, however, from the latter case that the question whether the applicant has other means of support may be considered, and, as it was shewn in that case that the applicant was living in adultery with the co-respondent, and that she was supported by him, and therefore had means of support independent of her husband, her application for interim alimony was refused.

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The circumstances of the present case are somewhat peculiar. The plaintiff alleges that her reason for leaving her husband was that he was endeavouring to compel her to commit adultery with Powers, yet it is shewn and is not contradicted that she left in company with him and has been living with him practically ever since under circumstances which, I think, must lead to the inevitable conclusion that they are living in adultery, and, although it is not so expressly stated, the reasonable conclusion is that she is supported by him.

I refuse the application with costs to defendant on final taxation.

NORTH-WEST PROVINCES.

(EDMONTON.)

SCOTT, J. APRIL 2ND, 1907.

TRIAL.

MERCHANTS BANK OF CANADA v. HOOVER.

Fraudulent Conveyance — Purchase of Land by Judgment Debtor—Transfer by Vendor to Wife of Judgment Debtor —Action by Judgment Creditors to Set aside—Evidence —Separate Property of Wife—Absence of Corroboration —Suspicious Circumstances—Intent to Defraud Creditors —Declaratory Judgment—Wife Trustee for Husband— Other Property of Husband—Costs.

Action by the bank and others, judgment creditors of C. F. Hoover, the husband of the defendant, to have it declared that a transfer of the north-west quarter of section 34, township 44, range 21, west of the fourth meridian, made by one Ole Oleson to the defendant, was fraudulent and void as against plaintiffs, on the ground that it was made for the purpose and with the intent of defeating, delaying, hindering, and defrauding plaintiffs.

N. D. Beck, K.C., for plaintiffs.

O. M. Biggar, for defendant.

SCOTT, J.:—Plaintiffs have executions upon their respective judgments in the hands of the sheriff in whose baili-

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wick the lands are situated. Hoover formerly carried on business at Wetaskiwin as a livery stable keeper. He left there about 12th December, 1904, and all his exigible goods were shortly afterwards seized and sold by the sheriff under a writ of attachment issued by one Giles, a creditor. The proceeds of the sale were applied pro rata upon the judgments recovered by the plaintiffs and other creditors, and realized sufficient to pay only 11.08 per cent. thereof, and, except as to that payment, the plaintiffs' judgments are still unsatisfied.

About 7th December, 1904, Hoover entered into an oral agreement to purchase the lands in question from Oleson for $800. The latter offered to sell the land to Hoover, who agreed to purchase, provided Oleson would take some horses and two notes in payment. They then went together to Hoover's stable and looked at two horses there, and, Oleson being satisfied with them, they next day went together to the office of one Rosenroll, where the sale and purchase was carried out, either on that day or shortly afterwards. The consideration for the transfer by Oleson consisted of the two horses and two promissory notes, one for $325 and interest made by one Lund, and the other for $250 and interest made by one Mead, both being payable to Hoover, and the Lund note being secured by a chattel mortgage to Hoover, which he assigned to Oleson. The property was, at Hoover's request, transferred by Oleson to the defendant, who obtained and now holds a certificate of title therefor.

In her evidence at the trial the defendant states that she was married to one Shaw in 1895; that she came with him to near Wetaskiwin in 1899, where he took up a homestead, upon which they lived until 1903, when he sold it to Hoover; that out of the proceeds of the sale Shaw gave her $895, and that, in addition to that sum, she then had a sum of about $300, of which $200 was realized from the sale of farm stock owned by her on the homestead, which she had purchased with moneys obtained from her brother, and the remaining $100 was money her father had given her; that she left Wetaskiwin immediately after the sale of the homestead, and went to St. Paul, where she remained about three weeks, and then proceeded to Dakota for the purpose of procuring a divorce from Shaw; that she remained there 6 months, and, having procured a divorce, she returned to St. Paul in December, 1903, and about the latter end of that month she came to Edmonton, where she resided until 12th December,

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1904. She was married to Hoover in June, 1904, but he continued to reside in Wetaskiwin until they left the province together about the latter end of December, 1904.

The defendant states that when she came to Edmonton in December, 1903, she brought with her about $5,000. She accounts for $4,000 of this sum by stating that when in St. Paul she had a man friend there who made false pretences to her which ruined her character; that they had an understanding with each other before she left there for Dakota, and when she returned to St. Paul he did not carry out his promise, and, being wealthy, he was glad to settle with her, and did settle with her by paying her the $4,000. She states that she never deposited any portion of the $5,000 in any bank, and that she always carried it about her person.

Among the investments stated to have been made by her after her arrival in Edmonton was the purchase of 20 acres from one Kline for $2,800, she paying him in cash, through Hoover, the balance of the purchase money over an incumbrance of $1,200. She states that Kline had purchased these lands from Hoover only a short time before she purchased, and she admits that both purchases may have been made on the same day.

Other investments alleged to have been made by her were the purchase from one Haild of his interest in certain lands for $200, and from one Codle of his interest in other lands for a like sum. She states that Hoover made the bargains with these men; that she gave him moneys to pay them; that she had the transfers from them prepared in Edmonton and gave them to him to get signed by the parties in Wetaskiwin; and that her name as transferee was not inserted in them until after they had been executed and returned to her.

As to the purchase from Oleson defendant states that Hoover told her that she could get the property for $800, and, after considering the matter, she told him she would take it, and she then gave him $800 for the purpose and $50 additional for the expenses of the transfer.

It appears from the defendant's evidence that she obtained the transfers at the same time, the date of their receipt by her being between 7th and 12th December, 1904. Hoover's goods were seized by the sheriff under the attachment on or before 3rd January, 1905.

I have referred at some length to the evidence of the defendant respecting the manner in which she acquired title, not only to the premises in question, but also to the other

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properties which she acquired about the same time, as it appears to me that her statements respecting the latter transaction are to some extent material in considering the question of her credibility.

There was not in the evidence before me the slightest corroboration of any of the material statements of the defendant respecting these dealings or the manner in which she claims to have acquired the moneys with which to make the purchases, and, as it appears that she was in a position to give such corroborative evidence, the fact that she omitted to do so is in itself suspicious: see Gowans v. Chevrier, 7 Man. L. R. 62.

In Merchants Bank v. Clark, 18 Gr. 594, it was held that transactions of this nature ought not to be held sufficiently established by the uncorroborated testimony of the parties to it, and this dictum has been followed in later cases in Ontario: see Morton v. Nihan, 5 A. R. 20, and Rice v. Rice, 5 O. R. 29.

Apart from the absence of any corroboration of the defendant's statements, there are many suspicious circumstances connected with the manner in which she acquired the lands in question. In the first place, all the negotiations with Oleson were carried in by Hoover, and the consideration for their transfer was the delivery of certain property of Hoover, which was thus withdrawn from the reach of his creditors, and, such being the consideration, it would require strong evidence to rebut the presumption that the land was bought for his benefit. Then there is the further fact that the purchase was completed and the transfer made to the defendant, at Hoover's request, only a short time before the issue of a writ of attachment against him. The circumstances under which the defendant states that she acquired the greater portion of the moneys with which to make the different purchases referred to by her are unusual and improbable, as is also her statement that she carried such a large sum of money about her person for such a long time.

I hold that the transfer from Oleson to the defendant was made with intent on her part, as well as on the part of Hoover, to defeat, defraud, and delay the creditors of the latter, and that it is therefore fraudulent and void as against the plaintiffs. The plaintiffs are therefore entitled to a declaration to that effect. They are not, in my view, entitled to the further declaration which they claim, viz., that the transfer should be set aside. It is valid as against Hoover,

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and is void as against his creditors. The plaintiffs are, however, in my view, entitled to a declaration that the defendant is, as against them, a trustee of the lands for the benefit of Hoover, and I so declare.

It was contended on behalf of the defendant that the plaintiffs were not entitled to succeed in the action, as they failed to shew that Hoover was not possessed of other lands out of which their claims could be realized.

I hold that it was not incumbent upon the plaintiffs to shew this.

I give the plaintiffs the costs of the action.

NORTH-WEST PROVINCES.

(EDMONTON.)

HARVEY, J. APRIL 4TH, 1907.

TRIAL.

MOSES v. BIBLE.

Vendor and Purchaser—Contract for Sale of Land—Rescission—Re-assignment of Interests Assigned—Payment of Value — Specific Performance — Injunction — Counterclaim to Set aside Judgment Obtained by Fraud and Perjury—Dismissal—Costs—Interest—Lien.

Action for an injunction, specific performance, and other relief, as set out in the judgment. Counterclaim by defendant against plaintiff and one Hill for damages and to set aside a judgment in a former action.

O. M. Biggar, Edmonton, and W. Gariepy, Edmonton, for plaintiff and Hill.

N. D. Beck, K.C., and C. F. Newell, Edmonton, for defendant.

HARVEY, J.:—On 8th June, 1904, Moses and Bible entered into an agreement in writing whereby Bible agreed to sell and Moses agreed to buy the east half of section 19-52-26 W. 4th, for $3,840, the terms of payment as specified by the agreement being $2,191.60 on the execution of the agreement,

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the assumption and payment by the purchaser of a mortgage on the land for $1,246, and the balance, $379.32, in one year. On the same day, by two different assignments, Moses assigned to Bible his interest under agreements for sale in 4 lots in the city of Edmonton, the consideration mentioned being $821.13 and $863, the receipt of which is acknowledged.

On 12th December, 1904, Hill began an action against Bible, claiming the east half of section 19 as his, and obtained an interim injunction restraining Bible from selling it. Judgment was given in that action on 3rd March, 1906, declaring Bible a trustee for Hill and liable to account. Moses was a witness at the trial on behalf of Hill.

In the meantime on 24th February, 1906, Moses had begun this action against Bible, claiming (1) an injunction restraining the defendant from dealing with the east half of section 19; (2) specific performance of the agreement; (3) an injunction restraining any dealing with the lots above mentioned; (4) in the alternative, an order cancelling the assignments of the interest of the plaintiff in the lots; (5) damages; and (6) costs. At the trial he amended his claim by adding to paragraph (4) a claim for a return of the amount of the purchase price paid in cash for the farm, and by adding a further claim: (7) a lien on the farm for the cash payment and interest thereon, damages, and costs.

The defendant Bible sets up that he is prevented from specifically performing his agreement by reason of the judgment obtained against him by Hill, which he says was obtained by fraud and conspiracy, alleging that, the value of the lots having increased much more than that of the farm, Moses assisted Hill by furnishing him with means for the purpose of bringing his action, and that they both committed perjury in giving their evidence, and by counterclaim he claims damages against Moses and Hill, and also as against Hill to have the judgment set aside.

There is no doubt that both in England and in Canada judgments obtained through perjury have been set aside: see Cole v. Langford, [1898] 2 Q. B. 36; Wyatt v. Palmer, [1899] 2 Q. B. 106; Johnston v. Barkley, 10 O. L. R. 724, 6 O. W. R. 549; but there is no settled law in this province to that effect, nor, as far as I am aware, is there any decision by any Court which is absolutely binding on me; and, under such circumstances, I am not prepared to say that I would follow the authorities mentioned. It seems most anomalous that while a defeated party in a case of conflicting testi-

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mony, in which, as in most of such cases, there is perjury on one side, and the trial Judge has to decide which party's evidence is to be discredited, can get no relief from a higher Court, as happened in the present case, yet he may go to another Judge, who may be differently impressed by the evidence, and get the relief which the appellate court refuses, and any principle permitting such a course would require to be kept within very close limits, or the theory of the finality of judgments would be completely subverted.

In the present case I do not believe the testimony of any one of the parties in its entirety, nor can I persuade myself that any one of them has honestly endeavoured to tell the truth. The evidence which was given on the first trial has been repeated before me, and it is not urged that there is any material variation, but some other evidence has been given of statements made by Moses after the first trial, and inconsistent with portions of his evidence then and now given. This evidence, however, is not very definite, and, to my mind, scarcely can be said to establish, even if believed, a clear and unequivocal contradiction of his sworn testimony, and I am of opinion that there is no new evidence before me which would justify a finding of absolutely clear perjury in respect of any of the evidence particularly set out in the pleadings, and warrant a reversal of the findings of the trial Judge, even on the authorities quoted.

The counterclaims will therefore be dismissed. I should refuse costs if I considered the defendant by reason of his conduct entitled to any favour, but I do not, and therefore the costs will follow the event.

On the argument the plaintiff did not press his claim for specific performance, but urged rather the alternative claim for rescission of the contract. I intimated that, having all the parties before me, I saw no reason why I could not remove any injunction there might be, and grant specific performance, the original judgment not declaring that the attempted sale by Bible was a breach of his trust, or in any event not being entitled to prejudice an innocent purchaser. Plaintiff's counsel, in the face of this intimation, while declining to state definitely that he abandoned his claim for specific performance, urged the alternative claim, and after the close of the case handed in to me through the clerk a newly framed prayer in which the claim for specific performance was placed as the alternative claim. At the same time counsel for Hill insisted on his right to the farm. The

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question then to consider is whether the plaintiff is entitled to a rescission of the contract; and, the defendant having made default and admitting his inability to carry out the contract, I think there can be no doubt that the plaintiff is entitled to have the contract rescinded. The question then to be considered is the plaintiff's rights on such rescission. It is stated by Williams in his work on Vendors and Purchasers, p. 949, that the party electing to rescind a contract is entitled to receive any money paid or property transferred by him thereunder, and that a purchaser rescinding the contract for a vendor's failure to shew a good title, may receive his deposit, if any, or any other sum paid on account of the purchase money, together with interest. The important question is, whether the plaintiff is entitled to have reconveyed to him the lots which he conveyed at the time the agreement was signed. I am satisfied that there was wilful perjury committed by one side or the other in the relation of the negotiations with reference to the lots. I am free to admit that I do not know to which side the perjury should be ascribed, and, if I had to decide the point, I would simply decide against the party on whom the burden rested, but it does not appear to me that it is necessary to decide that point, for it is agreed that the lots were taken on the sale of the farm in lieu of money, which Moses did not have. No mention of the lots is made in the agreement, and they were absolutely transferred, as far as the plaintiff's interest was concerned, for a consideration which is stated to be money. If they had been disposed of before this action was begun, the plaintiff would have the same right to ask for a rescission, and it seems to me that the consequence would have been the same. The case appears to me the same as that of the farmer who with butter and eggs or other produce receives a credit of their value, with which he pays in whole or in part for some article which for some reason he subsequently acquires the right to refuse to accept or to return. Surely it would not be contended that he should get back the actual produce, but rather the value in money. In the present case a definite sum was fixed for the lots, and they were accepted in lieu of cash for that amount. In my opinion, what the plaintiff is entitled to receive is the amount of the purchase price, paid as determined by the terms of the agreement, viz., $2,191.60, for which he should have judgment. He has been in possession of the farm, and, as the evidence shews, has had some profits from it, and, if the par-

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ties agree, they may be offset against the interest which he would be entitled to receive. If not, the plaintiff's judgment will include interest on the $2,191.60 at the legal rate from the date of the agreement, and he will account for the profits, and there will be a reference to the clerk to ascertain the profits, which will be set off against his judgment. The costs of the reference, if one is had, will be reserved.

It appears clear from the authorities that plaintiff is entitled to a lien on the half section for the amount of his judgment, and he will have judgment accordingly. As in the result the plaintiff is held not entitled to a return of the lots, he had no right to the injunction which he obtained restraining any dealing with them, and it will be dissolved, and any costs incurred by reason of the injunction will be to the defendant Bible. As regards the general costs of the action, I am of opinion that the plaintiff should not be allowed costs. If he had asked for a rescission of the contract in the first instance, the defendant might not have resisted his claim. Indeed the whole defence was an attempt to get rid of the barrier preventing the defendant from specifically performing the contract, and there, perhaps, would be justification for making the plaintiff pay the defendant's costs, but I think the ends of justice will be served by allowing no costs to either party.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. APRIL 9TH, 1907.

CHAMBERS.

CYR v. O'FLYNN.

Practice—Application to Strike out Name of a Defendant—Dismissal, because Made before Appearance—Second Application—Refusal to Entertain—Costs.

Motion by defendant La Chance to strike his name out of the action and to vary a former order.

Wood, Regina, for applicant.

H. V. Bigelow, Regina, for plaintiff.

NEWLANDS, J.:—This is an application to strike out a party defendant and to vary an order granted by me on 14th

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March, 1907, by making the costs of and incidental to that application costs in the cause to the plaintiff in any event. The order of 14th March referred to was: "It is ordered that the application of the defendant La Chance for an order striking out the defendant La Chance as a party defendant to this action be and the same is hereby dismissed with costs. And it is further ordered that after taxation of said costs the plaintiff may issue execution for the same."

On the return of the summons Mr. Bigelow took the objection that, as I had dealt with the matter in the order of 14th March, it was res judicata, and that I had no jurisdiction to deal with the same.

I was of opinion at the hearing that the first summons not having been considered on its merits, but being dismissed because the defendant La Chance had not entered an appearance to the action, it was not res judicata, and that I had the right to make the order asked for as far as striking out the defendant La Chance as a party defendant, but, after a careful consideration of the English authorities, I have come to the conclusion that I have not authority to make that order.

In a number of English cases where an order was refused because there was not sufficient material produced on the application, and where all the material was produced on the second application, the order was refused. In these cases it can hardly be said that the application disposed of by the first order was heard on its merits, but rather on the merits of the material produced.

In The Queen v. Pickles, 12 L. J. Q. B. 40, where a rule for a mandamus obtained by churchwardens had been discharged with costs, on the ground that their affidavits were imperfect, and a subsequent rule was obtained by the same parties, on the same ground, on amended affidavits, the Court refused to hear the second application on the merits, and discharged the second rule also with costs.

In The Queen v. Manchester, 8 A. & E. 413, it was held that where a party applying for a certiorari fails from the incompleteness of his affidavits he will not have a certiorari granted to him upon fresh affidavits supplying the defect. Lord Denman, C.J., in giving judgment, said: "Now, if the Court can in any case be deprived of discretion as to granting a certiorari, it is under such circumstances as these. For the rule of practice, if not altogether universal and inflexible, is as nearly so as possible, that the Court will not allow a party to succeed on a second application who has pre-

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viously applied for the very same thing without coming properly prepared."

In Joynes v. Collinson, 13 M. & W. 557, where the defendant applied for security for costs, and his affidavit was defective because he swore he was informed and believed plaintiff resided abroad, but did not give the grounds of his belief, a second application in which this defect was cured was refused because the previous rule was disposed of on the ground of the insufficiency of the affidavit.

In all these cases the second application was refused because the party had not come properly prepared the first time, and in none of them was the first application heard on its merits.

The rules which apply in cases like the present are concisely given by Lord Justice A. L. Smith in Preston Banking Co. v. Wm. Allsup & Sons, 1 Ch. D. 141. At p. 144: "This is not an application to rehear a matter before the order has been drawn up and perfected. Nor is it an application to vary an order which has been drawn up not in accordance with the order pronounced by the Judge. Nor is it an application that the Judge should make an order supplemental to the order drawn up; but it is an application that he should rehear the order made and perfected and make another in its place. In my opinion, the Judge had no jurisdiction to do this, though in the three former cases he might have done so."

The summons will therefore be dismissed with costs to defendant in any event.

YUKON TERRITORY.

SEPTEMBER 15TH, 1906.

COURT EN BANC.

RE KLONDIKE CITY TOWN-SITE.

Constitutional Law—Ordinance of Yukon Council relating to the Decision of Constitutional and other Territorial Questions—Power of Council—Placer Mining Regulations—Locations — Exceptions — Government Reservations for Town-sites—Lands within the Boundaries of City, Town, or Village — Powers of Commissioner — Lands Act — Orders in Council.

Under chapter 6 of the Ordinances of the Yukon Council for the year 1906, intituled "An Ordinance relating to the

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Decision of Constitutional and other Territorial Questions," the Commissioner of the Yukon Territory referred to the Territorial Court of the Yukon Territory for hearing and consideration the following matter, and requested from the Court a decision of the questions involved:—

1. Section 8 of the Placer Mining Regulations, approved 13th March, 1901, provided that "every free miner shall, during the continuance of his certificate, but not longer, have the right to enter, locate, prospect, and mine for gold and other minerals upon any lands in the Yukon Territory, whether vested in the Crown or otherwise, except upon government reservations for town-sites, land which is occupied by any building, and any land falling within the curtilage of any dwelling house, and any land lawfully occupied for placer mining purposes, and also Indian reservations."

2. By order in council of 31st July, 1905, which came into force on 7th October, 1905, the words "except upon government reservations for town-sites" were omitted from the section above cited, and the words "except within the boundaries of a city, town, or village, as defined by an Ordinance of the Yukon Council," substituted therefor

3. The Yukon Placer Mining Act of 1906, sec. 3, provides that "any person over, but not under, 18 years of age, may enter," etc., concluding in the same language as the above cited section, as amended by the said order in council, except that the word "any" is substituted for the word "an" before the word "Ordinance."

4. In the spring of 1898 the Commissioner of the Yukon Territory caused to be surveyed into town lots the flat at the mouth of the Klondike river, on the south side thereof, and on the side of the Yukon river, which was then and has been since known as Klondike city town-site.

5. Subsequently sec. 3 of the Regulations governing the administration of Dominion lands in the provisional district of the Yukon Territory, adopted by order in council of 7th July, 1898, P. C. 1795, enacted that "the Commissioner of the Territory is empowered and instructed to locate town-sites when, in his opinion, it is likely the business of the locality may require them, and shall particularly at once proceed to locate such town-sites at the following places, Dawson City, Fort Selkirk or thereabouts, the mouth of the Stewart river, as well as other places as aforesaid. The area of such sites shall be of such dimensions as the Commissioner of the Territory may deem advisable, and shall be divided

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into lots of 50 feet frontage by 120 feet in depth, with streets 66 feet in width, unless there be circumstances which prevent the surveying of the lots and streets to the size and width named, in which case the Commissioner may alter these Regulations to suit the necessities of the case."

6. This section has been changed so that in the Regulation in force since 1902 it reads as follows: "The Commissioner of the Territory is empowered and instructed to locate town-sites where, in his opinion, it is likely the business of the locality may require them. The area of such sites shall be of such dimensions as the Commissioner of the Territory may deem advisable, and shall be divided into lots of such size with streets of such width as he may deem in the best interests of the public."

7. Ordinance No. 41 of 1901, reproduced in chapter 68 of the Consolidated Ordinances of the Yukon Territory, to which the Court is asked to refer, contains definitions of the expression "Klondike city."*

8. There does not appear to be any other Ordinance of the Yukon Council defining the word "city." "Town" is defined in sec. 2 of ch. 64** and in sec. 2 of ch. 65*** of the Consolidated Ordinances. Klondike city has never been brought under the provisions of either of said Ordinances.

The Court is asked to determine whether:—

1. (a). Klondike city was excluded from location for placer mining purposes as a town-site under the state of the law and facts as above set out previous to 7th October, 1905; and (b) whether it is so excluded by virtue of the order in council which came into force on 7th October, 1905, and of the Yukon Placer Mining Act.

2. What is the proper interpretation of the words in sec. 3 of the Yukon Placer Mining Act, "except within the boundaries of a city, town, or village, as defined by an Ordinance of the Yukon Council?" Do they exclude from location (a) land within such boundaries of a city, town, or village as had at the time of the passing of the Act already been actually fixed under or by virtue of Ordinances of the Council; and (b) land within such boundaries as might be fixed under the authority of the then existing Ordinances; and

* Merely a description by metes and bounds.

** "Town includes the city of Dawson, any incorporated town, and any town organized under the provisions of the Ordinance respecting towns. No 29 of 1901, s. 2."

*** "The expression 'town' means any town organized under the provisions of the Ordinance. No. 31 of 1901, s. 2."

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(c) land within such boundaries as might be fixed by or under the authority of later Ordinances of said Council?

3. Can the Council by future legislation vary the boundaries of any city, town, or village so as to enlarge or restrict the area of land excluded from location under sec. 3 of the Yukon Placer Mining Act?

4. Has the Commissioner power to subsequently reduce or alter the area of a town-site located by him under said regulation?

F. T. Congdon, for the Commissioner.

H. C. Bleecker and F. G. Crisp, for persons interested.

DUGAS, J.:—I believe it to be my duty to declare that I have my doubts as to the constitutionality of the Ordinance under which we are asked to give a direction.

I can understand that the federal legislature, being vested with unlimited powers, with the exceptions contained in the constitution, could pass a law referring to the Supreme Court constitutional questions, but, although as far as I know two provincial legislatures besides the Yukon Council have passed statutes based upon the same principle, there may be a great deal in the objection raised by Mr. Bleecker as to the constitutionality of the present law, and more particularly as to the right of this Court to decide the questions submitted under it.

However, I do not believe that it is necessary to go as far as that for the moment, as I come to the conclusion that Klondike city is a town-site which is excepted from the right of miners to locate the same or any portion thereof.

Under the Lands Act the Minister of the Interior, and afterwards, for this Territory, the Commissioner, was empowered to lay out a tract or tracts of land into town or village lots. There are regulations which order a survey of the same by the local surveyors and the submission of the survey to the Surveyor-General, plans of which are deposited and become authentic as delimiting such town or village sites; streets are laid out and the sale of the lots therein are made otherwise than the other lands falling under the Lands Act.

This was done for Klondike city, and notwithstanding the local Ordinance, which, for purposes which I cannot understand, define the limits of Klondike city, and the orders in council referring to the same or to any other Ordinance, there is no doubt that since it has been let out

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in 1898 as a town-site, and more particularly after it had been surveyed in the way above mentioned, that what is called now, either by Ordinance or otherwise, Klondike city, still remains a town-site, or a town, and that the regulations do not allow any claim to be staked within its boundaries. To have the same changed, the least which should be done would be to submit any order made by the Commissioner to the same surveys as those needed in the first instance.

For these reasons my answers are as follows:—

To question 1 a: Yes.

To question 1 b: Yes.

To question 2 a: Yes.

To question 2 b: Yes.

To question 2 c: This question presents some difficulties, for there is no doubt that when one law refers to another law, passed more particularly by another legislature, the principle is to embody the last law as it was at the time that it was passed, and does not include the amendments thereto. The words "except within the boundaries of a city, town, or village, as defined by any Ordinance of the Yukon Council," make it difficult to declare whether the word "defined" refers to the boundaries already established by any Ordinance in existence, or whether it means the same boundaries defined, or to be defined. Taking the supposition that the first intent only was in the mind of the legislature, they could not use for that purpose any clearer expression than the one found in this dictum of the law. It may be that also it was the intention to apply the same to future boundaries, but I think that it is safer to give the first interpretation and to answer this question in the negative.

To question 3: No.

To question 4: No.

CRAIG, J.:—I have had the privilege of reading the judgment of my brother Dugas, and will express no opinion now upon the point raised by him as to the constitutionality of the Ordinance under which we are asked to give a direction, reserving to myself the right on any future submission to fully consider that question. I am satisfied, however, that neither the Yukon Council nor the Commissioner of

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the Yukon Territory has any power to submit a question affecting the administration of federal affairs, nor would any judgment which this Court could give under such submission be effective in regulating the administration of Crown lands of the federal government; such a judgment would be null and void and of no effect, and a useless act so far as it affected titles settled under such a judgment; that the federal authorities — the Minister of the Interior — might properly ignore any such judgment in the administration of Crown lands or mining lands in this Territory. How far the questions submitted to us now in their administration would have such effect, I am not now prepared to decide, but will answer the questions submitted as I conceive they ought to be answered, in my opinion. To question 1 (a) I would answer yes; as to question 1 (b), yes; 2 (a), yes; 2 (b) yes; 2 (c), no. As to question 3, no; question 4, no. For the purpose of this submission I deem it unnecessary to decide whether the term "city" has or has not been defined by an Ordinance of the Yukon Council, or whether the word "defined" includes also "delimited." I think the Klondike city was laid out as a town-site, and remains a town-site, and is thus excluded from location under the Placer Mining Ordinance or Act.

MACAULAY, J.:—I have had the privilege of reading the judgments of my brothers Dugas and Craig, and will express no other opinion in regard to the point raised as to the constitutionality of the Ordinance under which we are asked to give a direction than that I do not believe the Yukon Council, nor the Commissioner of the Yukon Territory, has the power to submit questions affecting the administration of federal affairs, and I do not think that any judgment that this Court could give under such submission would be effective if it attempted to deal with the administration of the Crown lands of the federal government.

In regard to the questions that have been submitted to us for an opinion, I concur in the opinions arrived at by my brothers in their judgments, and would answer the questions in the same manner that each of my learned brothers has answered them. Consequently it is unnecessary for me to enumerate the questions.

In regard to "Klondike city:" I agree with the judgments of both my brothers, that it was set aside as a town-

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site, and am of the same opinion that my brothers were—that the name given to such town-site is not material. It might have been given any other name as well as the one by which it was designated. It still remains a town-site, or a town, and, under the regulations, it does not allow of any claim being staked within its boundaries.

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NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. APRIL 26TH, 1907

CHAMBERS.

REX EX REL. SMITH v. SCHICK.

Municipal Elections—Election of Councillor — Disqualification—Paid Official of Municipality — Duties of Office Completed before Nomination.

Summons to try the validity of the election of the respondent as a councillor of the rural municipality of South Qu'Appelle, and also to try the validity of the alleged election of the relator, Lewis Carmichael Smith, as such councillor.

The respondent was returned as the elected councillor, and the relator charged that the respondent was improperly elected, by reason, first, that he was a paid official of the municipality at the time of his nomination and election, and second, that he was guilty of bribery and of using undue influence.

The first point was argued on 16th April, 1907.

T. A. Colclough, South Qu'Appelle, for the relator.

A. L. Gordon, Regina, for the respondent.

NEWLANDS, J.:—From the evidence given in this case I am of the opinion that the respondent's duties ceased in the middle of July, and that at the time of his nomination and election he was not a paid official of the municipality. He was not appointed an inspector under the Noxious Weeds Ordinance, under which his duties might be continued throughout the year, but to perform the duties set out in subsec. 49 of sec. 95 of the Municipal Ordinance, which would have to be completed before the taxes for the current year were levied.

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MANITOBA.

MACDONALD, J. APRIL 18TH, 1907.

TRIAL.

GARSON v. WATSON.

Contract—Supply of Building Material—Action for Balance of Price—Extras—Terms of Contract—Failure to Comply with—Inferior Material — Counterclaim — Acceptance of Material—Delay in Completion of Building.

The plaintiff, a quarry-master, entered into an agreement to supply the defendant, a contractor, with a quantity of stone and building material, which the defendant required in the construction of a bank building for the Bank of Montreal in that part of Winnipeg known as Fort Rouge, for $5,700, and brought this action to recover the balance of the purchase price of material supplied under the agreement, and also to recover for extra material supplied in connection with the building, and also for gate stones, the cost of which was $350, supplied the defendant in connection with some other contract.

C. P. Fullerton, for plaintiff.

A. B. Hudson, for defendant.

MACDONALD, J.:—There is some dispute as to the right of the plaintiff to recover for the extras, other than the item of $350 referred to, and an item of $50 for replacing a broken cap, and as to these latter the plaintiff is entitled to recover. As to the other extras, I think the plaintiff cannot recover. The defendant contends that these were not extras but goods supplied and work done under the contract between them and covered by the contract price of $3,700. The plaintiff, after the final delivery of goods, sent the defendant a bill which does not make any claim to the extras now sought to be recovered, excepting the $350 item referred to, and two other items of $36 each, and, after giving credit for $5,000 received on account, claims a balance of $1,122. The item of $50 for replacing the broken cap is omitted from this account. The plaintiff in his evidence admits that he would have taken the amount without the extras, had de-

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fendant paid when work completed, or if they did not (using his own words) have a scrap.

The defendant alleges that it was a term and condition of the contract that the material to be supplied by the plaintiff was to be according to plans and revised specifications made therefor by the architects, and that the material supplied was not in accordance with the plans and revised specifications, and was of an inferior quality, by reason of which the defendant has been unable to get from the architect superintending the building a certificate of its due completion, and has suffered loss and damage thereby.

The defendant further contends that the plaintiff should be paid for his material and work only upon compliance with his contract, according to the plans and specifications, and that such material has not yet been supplied, and that, in consequence, the time for payment has not yet arrived, and also that the plaintiff neglected and refused to supply such material within a specified time according to agreement between them, and the defendant sets up, by way of counterclaim, the several acts of default of the plaintiff mentioned, and claims $2,000 damages.

As to the defence, and the same applies to the counterclaim, the evidence is conflicting. The plaintiff supplied the material to the defendant, having first worked the same into the form and condition necessary for its proper position in the construction of the building referred to. The defendant accepted the material and placed it in position, and not until after such materials lose their character of chattels and become part and parcel of the building are any objections, with one exception, taken to them. Objection is taken to the delay in delivering such material, and in a letter from the defendant to the plaintiff of 17th July, 1905, he states that unless the cut stone is supplied within 3 days he, the defendant, will take steps to procure it from some one else, and any additional cost or expense would be charged to the plaintiff. The plaintiff evidently satisfied the defendant, as the cut stone was not received elsewhere.

After a careful consideration of the evidence, I do not feel justified in holding that the plaintiff was responsible for the delay in the completion of the building and the consequent loss to the defendant, and I must, therefore, dismiss his counterclaim with costs.

The defendant asserts that an error was made in the cut stone panel over the front entrance door, to which objection

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was taken by the architects at the time of its erection, and the defendant says he brought this to the notice of the plaintiff. The objection was that this panel has a projection of three inches instead of one inch according to the architects' detail, and the defendant says that the plaintiff agreed to reduce this panel to correspond with the detail, and on 3rd May, 1906, the defendant wrote the plaintiff enclosing a letter from the architects, and asking him to have this small matter attended to at once, to complete his contract.

The plaintiff says that the first time he was notified, or in any way made acquainted with any objection to this panel, was on receipt of this letter, but, accepting the defendant's evidence as correct, he received the panel and put it in its place on an agreement with the plaintiff that it should be reduced as stated, and the omission of the plaintiff to carry out this latter agreement is not such as to disentitle him to bring this action and recover the price of the material supplied. The reducing of this panel to correspond with the detail is a trifling matter, and according to the evidence the cost of doing so will not exceed $10. I allow the defendant this amount in reduction of the plaintiff's claim.

The plaintiff is entitled to a verdict for $1,162, together with interest at 5 per cent. per annum from the date of the issue of the statement of claim, and costs of the action.

MANITOBA.

RICHARDS, J.A. APRIL 29TH, 1907.

TELLIER v. SCHILEMANS.

Will — Undue Influence — Want of Testamentary Capacity — Action to Set aside — Evidence — Bills of Sale — Conveyances of Land — Transfer of Business — Setting aside — Absence of Consideration.

Action by daughter of testator to have a will and other documents set aside, on the ground of undue influence.

J. E. O'Connor, J. H. Leech, and H. Price Blackwood, for plaintiff.

A. Haggart, K.C., and H. W. Whitla, for defendants.

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RICHARDS, J.A.:—Denis D'Aoust, who then lived in Eastern Canada, was compelled to leave his wife because of her unfaithfulness to him. They had one child, the plaintiff, whom D'Aoust brought with him to Winnipeg, where he got employment as a hack driver. At Winnipeg he became acquainted with the defendant Clara Schilemans, who was working in a hotel or restaurant. Their acquaintance deepened into an intimacy, and resulted in her living with him as his wife and passing as such.

A restaurant business on Main street, Winnipeg, was acquired and carried on by them. D'Aoust's daughter, the plaintiff, used to work in the restaurant, and he and she had their meals there. D'Aoust became the owner of the cab which he drove. In the course of time he acquired other cabs and horses. He for a while rented a livery barn, but he finally built one of his own, in which he carried on a large cab business till the time of his death.

The evidence shews that D'Aoust was very fond of his daughter. When she grew up Louis Tellier became attentive to her and wished to marry her. Her father opposed the match and refused to allow Tellier's presence at their home, and Tellier, as a result, wrote very insolent letters to D'Aoust. The plaintiff used to meet him without her father's knowledge but with the connivance and assistance of Clara Schilemans and her sister Rose Timmermans, who had then lived with them for some months.

By pretending to wish to visit her relatives in the province of Quebec, and to go by way of Chicago, the plaintiff, with the connivance of Mrs. Schilemans and Miss Timmermans, got her father to allow her to take the journey. She stopped at Chicago and met Tellier there by appointment and married him. This caused her father great annoyance and grief. After a while, however, he decided to bring her back to Winnipeg and sent her a railway ticket to return with. After her return Rose Timmermans lent her the money to bring Tellier back. There was a good deal of trouble for a while, but D'Aoust undoubtedly forgave his daughter fully, though I do not think the evidence shews that he ever looked favourably upon Tellier. Still he condoned the matter, and his affection for his daughter was in no way decreased. A child was born to the Telliers, and D'Aoust was exceedingly fond of this grandchild.

Joseph Dujardin became attentive to Miss Timmermans and sought her in marriage. On 5th July, 1905, a partner-

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ship agreement between Dujardin and D'Aoust was entered into, which recited that they intended to carry on a livery business in Winnipeg, and that the livery business then carred on by D'Aoust was worth $18,000 for stock and goodwill; that Dujardin was to pay $9,000 for one-half interest in it; that the partnership was not to be formed until Dujardin returned from an intended visit to Europe. The agreement then provided that, on payment of $2,000 on or before 20th August, 1905, Dujardin should have an absolute right to enter into partnership with D'Aoust, and that the partnership should be formed in October, 1905; and that Dujardin was to pay, in addition to the $2,000 above mentioned, $1,000 per year on 1st November in each year until, including the $2,000, the whole sum of $9,000 should be paid, with interest at 6 per cent. The agreement further provided that, if Dujardin should not pay the $2,000 on or before 20th August, 1905, then D'Aoust should have the full right to cancel the agreement.

Dujardin then married Miss Timmermans, and took a trip to Europe. On their return they resided with D'Aoust and Mrs. Schilemans.

The evidence is conflicting as to whether the $2,000 was paid or not. It is certain, however, that the $1,000 agreed to be paid in November, 1905, was not paid.

D'Aoust's wife appears, during the end of 1905, or early in 1906, to have decided to claim alimony from him. Letters from friends told D'Aoust that she intended to come to Winnipeg to try to enforce that claim, and in these letters it was suggested that his daughter was encouraging the wife in that intention. D'Aoust had been in failing health some time prior to getting those letters.

The wife did come to Winnipeg and went to stay at the plaintiff's house. The plaintiff went with her to Messrs. Bonnar & Hartley's office and interpreted for her, in connection with her instructions to the wife's solicitor, Mr. Bonnar, regarding her claim for alimony. Mr. Bonnar then wrote D'Aoust a letter making a claim on behalf of the wife.

On 17th April, 1906, D'Aoust became ill while driving a cab at a funeral, and was taken to his residence over his stable. He suffered great pain and was very weak. On 28th April he was taken to the St. Boniface hospital and died.

On the day he so became ill he executed a will, by which he gave all his property to Mrs. Schilemans. On 18th April

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he executed to her and her brother-in-law, Joseph Dujardin, a bill of sale of all his chattel property, being the plant in the barn and livery stable. On the same day he executed to her a deed of the land on which the stable stands, for the expressed consideration of $2,000. The land was under mortgage to the Canada Permanent and Western Canada Mortgage Corporation. The deed declares it to be granted subject to that mortgage, but contains no covenant, on the part of the grantee, to pay the mortgage. It does contain a covenant by the grantor, that he has done no act to incumber the lands.

On the same day Joseph Dujardin executed to D'Aoust a chattel mortgage, expressed to be on one undivided half interest in the goods mentioned in the above named bill of sale. The expressed consideration is $7,000, made repayable, in amounts of $1,000 each, on 1st December in each of the years 1906 to 1912 inclusive, with interest at 6 per cent. It does not contain any clause covering after-acquired property, or property by which any of the plant may be replaced during the above period.

On the same date D'Aoust executed to Clara Schilemans an assignment of the chattel mortgage, for the expressed consideration of $7,000. No consideration was given for that assignment.

By a further instrument, dated 23rd April, 1906, Mrs. Schilemans conveyed to Dujardin a half interest in the chattel property, and by deed of the same date she conveyed to him the real estate on which the barn and stable stand.

By instrument bearing the same date, Dujardin mortgaged to Mrs. Schilemans the above named chattels, and all other goods and chattels substituted for the same, or to be brought on the said premises in the common course of business during the currency of that mortgage, until it, and any renewal thereof, should be fully paid. By a further instrument of the same date Dujardin mortgaged to Mrs. Schilemans the real estate.

The two last named mortgages purport to secure $24,000, payable as follows: $3,500 on 1st July, 1906; $2,000 on 1st May in each of the years 1907 to 1916, inclusive; and the balance on 1st May, 1917. Although the above named conveyances bear date 23rd April, they were, apparently, executed at the same time as the others, on 18th April.

On 23rd April D'Aoust executed, under seal, an assignment to Mrs. Schilemans of all book debts and accounts due

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to him, and also executed a transfer to Dujardin of the goodwill of the livery business, and on the same date Mrs. Schilemans similarly transferred to Dujardin all her interest in the books of account of D'Aoust.

This action was brought by the plaintiff against Mrs. Schilemans and Dujardin to have the will and all the other above named documents set aside, on the grounds, as to the will, that D'Aoust was not a free and capable testator, and that the will was procured through the undue influence of Mrs. Schilemans, and, as to the other documents, on the ground that they were obtained by Mrs. Schilemans and Dujardin taking advantage of the weak and infirm state of mind and health of D'Aoust, and of confidence reposed by him in her and of her ascendancy and influence over him, and by fraud and deception.

The defences deny all charges of fraud, deception, and undue influence, and allege that D'Aoust was possessed of full testamentary capacity, and in his right mind. They further allege that the conveyances to Mrs. Schilemans were executed for good and valuable consideration, and after receiving the benefit and protection of independent legal advice, and that the conveyance to Dujardin of the half interest in the chattels was made in pursuance of the agreement for partnership hereinbefore mentioned.

As to the will. The grounds relied on by the defence as a reason why D'Aoust by his will gave everything to Mrs. Schilemans and left his daughter unprovided for, are:—

First, that he was so annoyed at his daughter's marriage with Tellier as to have lost his affection for her.

Secondly, that he was greatly influenced against her by her alleged connection with his wife's coming to Winnipeg and making a claim upon him for alimony, and that he was especially troubled at the prospect of the public becoming aware that Mrs. Schilemans was not his wife.

Thirdly, that he was indebted to Mrs. Schilemans in large sums, exceeding $9,000 in all.

As to the conveyances, it is alleged that he made them in consideration of that alleged indebtedness, and also in order to provide for Clara Schilemans, and to deprive his wife of any recourse against his property in case of her being declared entitled to alimony.

I have already stated that I am satisfied from the evidence that D'Aoust had forgiven his daughter for her run-

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away match with Tellier, and had fully reinstated her in his affection, so far as that was concerned.

As to the claim that he was angered at her over her actions in connection with her mother's arrival. The evidence shews that the plaintiff was not espousing her mother's cause, but was rather endeavouring to get a quiet settlement, so as to save D'Aoust trouble and to prevent the scandal that would arise if it became publicly known that Clara Schilemans was not, in reality, D'Aoust's wife. Her evidence in this respect is corroborated by that of Mr. Bonnar, who was called as a witness by the defence.

Mr. Bonnar went to see D'Aoust at the latter's request, and says that D'Aoust wished for a settlement and referred him to his solicitor. But the latter, when seen, refused to consider the question of settlement.

An undenied fact is that the plaintiff visited D'Aoust during his illness almost daily, and sometimes more than once a day, and stayed a considerable length of time at each visit, and I find the fact to be that D'Aoust was very glad to see her. Mr. Bonnar shews that when he went to see D'Aoust, at the latter's request, to discuss the wife's alleged claim for alimony, D'Aoust expressed a desire to see his daughter and appeared to be as affectionate towards her as ever. Mrs. Schilemans, herself, in effect, states in her evidence that D'Aoust was inclined to speak reproachfully of his daughter a day or two before his death because of her not having called to see him as often as he wished.

There has been no suggestion that the plaintiff had any interest to serve in bringing her mother to Winnipeg; and there is no evidence whatever that she did bring her, or encourage her to come. The mother was a stranger to the plaintiff, whose love for her father, alone, would prevent her having any affection for the woman.

The plaintiff, in fact, did nothing more than common decency and humanity required that a woman should do to another woman, who was destitute, and who was her own mother, and a reasonably just man, such as D'Aoust was stated to have been, would, I think, recognize that fact. She talked the matter over with him both before and after her mother's arrival and explained her position to him; and he expressed himself satisfied, though there is reason to believe that, later on, his weakness was worked upon, to temporarily excite him against her.

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I think the defence have wholly failed to prove that D'Aoust had lost his affection for his daughter at the time he made the will and executed the conveyances.

Then, as to the alleged indebtedness of D'Aoust to Mrs. Schilemans. She says that she owned the restaurant and made large sums of money in it and gave them all to D'Aoust; that she also received, as gifts from her father, a lace manufacturer in Belgium, consignments of laces, which she sold for large sums, giving the proceeds to D'Aoust.

The evidence does not bear out these contentions. Mrs. Schilemans did manage the restaurant, but the evidence shews, I think, that D'Aoust himself was the proprietor. It apparently made no such profits as she suggests, but merely supported her and D'Aoust and the plaintiff. That, however, left D'Aoust in a position to apply most of his earnings from the cab business to the purchase of new cabs and horses, and, in that way, her work was of value to him, just as the work of a wife would be.

If the story of Mrs. Schilemans is true, she earned such profits as enabled her to give D'Aoust nearly $1,600 a year, in addition to paying the rent for their rooms, and clothing herself and the plaintiff. She, however, sold this business, as a going concern, for only $350 to Mrs. Van Buren; and Mrs Van Buren swears that, during the treaty for the sale of it to her, Mrs. Schilemans stated that they sometimes made as much as $50 a month out of it. These facts practically negative the evidence of Mrs. Schilemans.

As to the proceeds of the sales of lace, she may or may not have given some of this to D'Aoust, but I find that she has not proved that fact, and I am not satisfied that the laces were given to her by her father. It seems to me, rather, that she was her father's agent in selling these, and had to account to him for the proceeds—less, probably, reasonable commission for her services.

The evidence shews that Mrs. Schilemans was nervous about her position, and, at times prior to D'Aoust's last illness, tried to get him to make a will, in order that she might be protected. Yet, though D'Aoust is stated to have been kindly disposed to her, and a generous and just man, she, admittedly, never got him to give her, or even asked him for, a written acknowledgment of the alleged indebtedness. There is some evidence that, at times, she handed him money; but there is nothing to shew that it was other

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than his own money, which she, as his acting wife, took charge of for him.

Mr. Benson and one or two other witnesses say that D'Aoust stated to them that he owed his success in his business largely to Mrs. Schilemans (whom in such conversations he described as his wife) and mentioned certain round sums as the amounts by which he had profited through her. These sums, as stated by these witnesses, vary so greatly that I cannot think he meant to refer to any actual monetary indebtedness. It seems to me that all he meant was that, owing to her loyal service as his de facto wife, he had been able to save money and get ahead of the world as he had done. There is no evidence whatever of Mrs. Schilemans, during his lifetime and prior to his last illness, asserting to any one that D'Aoust owed her money.

Of course D'Aoust, in spite of all that is implied in the foregoing holdings, could give all that he possessed to Mrs. Schilemans; but his intention to do so requires strong proof, in view of his regard for his daughter. The plaintiff's evidence, which I think was given very fairly, states that during D'Aoust's last sickness, and at a date after the will in question was actually made, he said to her that he had made a will giving Clara Schilemans $10,000 and giving the rest (except a legacy to a nephew and some money to the church) to her, the plaintiff, and her child.

The evidence of the Rev. Father Portelance, D'Aoust's parish priest, who was called as a witness by the defendants, is extremely important on that question. He saw D'Aoust on the day on which his last illness began, or the following day, and spoke to him about making a will. D'Aoust then said that he had made one, giving $10,000 to Clara Schilemans, and the balance to the plaintiff's child. Father Portelance did not, on that occasion, understand whether D'Aoust meant that he had actually executed such a will, or that he had merely given instructions for one in those terms.

Two days later, which is undoubtedly after the will in question was made, D'Aoust repeated the above story to Father Portelance, who then understood him definitely to state that he had actually made such a will.

At a third interview, two or three days later, D'Aoust shewed anger towards his daughter, and stated that he thought of changing his will, so as to deprive her of the

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benefits which he supposed he had given her by the will already made, and asked Father Portelance's opinion as to whether, in conscience, he was at liberty to do so.

This third interview was probably very soon after D'Aoust received the statement of claim in the action for alimony, the claim for which, according to Mr. Bonnar's testimony, he, D'Aoust, had probably expected to be settled without the publicity of a lawsuit.

The above evidence of Father Portelance shews that D'Aoust did not understand the will which he had signed.

D'Aoust was not properly advised as to the making of the will. In so finding I do not suggest, or think, that the solicitor who drew the will meant to be derelict in his duties; but he should have seen that he received instructions by himself, in the absence of Mrs. Schilemans and of any other person whose presence might influence D'Aoust. I am not satisfied, on the solicitor's own evidence, that he did so receive his instructions, and the evidence of the defendants seems to shew that defendant Schilemans was present. The solicitor, too, should have pointed out to D'Aoust that he had a daughter and grandchild, and should have asked him if he intended to make provision for them.

Then as to the conveyances. That to Dujardin, of a half interest in the chattel property, I do not think can stand. It seems doubtful whether Dujardin had paid the first $2,000 provided for in the agreement for partnership, but he had not paid the money due in November, 1906, and, up to the time of D'Aoust's final sickness, he, D'Aoust, had no intention of actually conveying an interest in the chattels to Dujardin. His own interest would have been to take proceedings to cancel the partnership agreement. The solicitor's evidence shewed that he did not advise Mr. D'Aoust of his position in this matter, but, rather, that he thought it his duty to protect Dujardin's interest.

The conveyances to Clara Schilemans must also fail. I think D'Aoust's indebtedness to her is not shewn to have had any existence in fact. Even if it had, the conveyances were improvident because, instead of conveying his whole property to her, it would have been sufficient to give her a mortgage to secure the alleged indebtedness; and he should have been so advised.

The conveyances to Mrs. Schilemans contain no power of revocation, and D'Aoust, who did not himself realize that his illness was going to be fatal, should have been advised

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that the effect of such conveyances was to strip him absolutely of all he possessed, and to put it in the power of Mrs. Schilemans to leave him with nothing wherewith to support himself during the remainder of his life. It is alleged that he made these conveyances in order to prevent his actual wife from getting at his property, under any judgment she might get for alimony. If his wife had deserted him and been guilty of adultery, as appears to have been the case, and to have been known to his solicitor, he should have been advised that she could not succeed in an action for alimony, and, therefore, that she could not get at his property if it remained in his possession.

The statements by D'Aoust, at his second and third interviews with Father Portelance, were made after the conveyances were executed, and shew that he did not understand that he was not still the owner of his property. The evidence of Olivier, another witness called by the defendants, shews that, after the conveyances had been made, D'Aoust went to his shop, to be shaved, and told him that he was expecting to sell his business to Dujardin. The witness was positive that what D'Aoust said was that he was expecting to sell, and not that he had sold.

The conveyances mis-state the alleged considerations. They are also, clearly, not maintainable as gifts inter vivos.

The attending physician described D'Aoust's trouble as attacks of angina pectoris and mitral regurgitation, and said that, in his opinion, they would not be followed by any diminution of the mental faculties, or by any loss of will power, and that, even during extreme weakness following such attacks, the power of the sufferer to resist importunity is not weakened in any way.

It is certain, however, that D'Aoust was failing for some time prior to his last illness.

The opinion of another physician of much longer experience, who was also called by the defence, but who had not attended D'Aoust in his last illness, was that angina pectoris is not in itself a disease, but rather a condition produced by disease. He also said that mitral regurgitation is frequently a result of Bright's disease, and that the latter does affect the mental conditions, and that angina pectoris and mitral regurgitation do not belong to each other, neither being caused by the other, and that he would not attribute to angina pectoris D'Aoust's illness previous to his last sickness.

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In view of the above, I cannot rely on the evidence of the attending physician as shewing D'Aoust's mind to have been clear.

Apart from the medical testimony, if the evidence of the defendants and Madame Dujardin, as to D'Aoust's sayings and actions in his last illness, were correct, it would, when considered with his statements to the plaintiff, Father Portelance, Mr. Bonnar, and others, merely shew that his mind was not clear enough for him to realize what he was doing in making the will or the conveyances.

There will be judgment declaring that the will in question is not the last will and testatment of Denis D'Aoust. There will also be an order setting aside and cancelling the bills of sale, the deeds, the land and chattel mortgages, and the conveyances of debts, books of account, and goodwill. Although letters of administration to D'Aoust's estate have not been taken out, this action is maintainable by the plaintiff, because the very fact of the existence of the will which has been attacked makes it impossible for any one to get administration until that will is declared invalid.

The injunction is to be continued and made permanent.

The defendants are to pay the plaintiff's costs forthwith after taxation thereof.

Such further details of the formal judgment to be entered as are necessary to the carrying into effect of this decision are to be spoken to, if not agreed on by the solicitors for poth parties.

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MATHERS, J. MAY 1ST, 1907.

TRIAL.

ROSEN v. LINDSAY.

Fraud and Misrepresentation—Sale of Hotel as Going Concern—False Representations as to Receipts and Profits—Manufactured Statement—Action for Deceit—Damages—Measure of.

Actin for damages for deceit in the sale by defendants to plaintiff of an hotel property as a going concern.

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N. F. Hagel, K.C., and W. Monahan, for plaintiff.

A. B. Hudson and A. V. Hudson, for defendants.

MATHERS, J.:—The defendants represented to the plaintiff that the average daily receipts of the hotel were $125, and that the net daily profits of the business were $85 per day, and as a proof of this fact there was produced, by the male defendant to the plaintiff, a book purporting to contain a daily record of the cash receipts of the hotel from 1st April preceding up to 17th November, the day before the sale. As a matter of fact this record was manufactured for the purpose of deceiving the plaintiff, and the entries in it were false. There was also produced and shewn to the plaintiff, by the defendant's selling agent, a card containing particulars of the property on which it was stated that the net profit per day was $85.

There is no direct evidence as to what Lindsay's daily receipts or daily profits were, but where, as here, it is found that the evidence produced by the defendants has been deliberately "cooked" for the occasion, the Court will be satisfied with slight evidence that the record produced is false.

The defendants moved out and the plaintiff moved in without any cessation in the business, the plaintiff retaining the same hotel staff; but the receipts from the beginning fell far below those shewn in the defendants' manufactured record. That falling off could not be due to the change in management, and satisfies me that the figures produced by the defendants to the plaintiff as the daily hotel receipts were false, and that the statement of net daily profits was also false.

It is contended on the defendants' behalf, however, that there is no evidence that the plaintiff sustained any damage by reason of such false representation. I quite concede that damage is the gist of the action, and that without proof of damage the plaintiff cannot succeed.

In addition to the written evidence produced by the male defendant to the plaintiff, he represented that the net yearly profits would be $10,000, which, in view of the figures produced, appeared to be a very modest estimate.

After running the hotel for 11 months the plaintiff sold it for $24,000, an advance of $3,000 on the price paid, taking, however, some land in part payment. During the

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11 months he conducted the business he made a profit of between $3,000 and $4,000. From these facts it is argued that he lost nothing, and, therefore, sustained no damage. It is true the plaintiff made a profit on a re-sale of the hotel and he also made a profit while conducting it. He did not, however, make as large a profit from the conduct of the hotel as he would have made had the representations made to him been true.

In Steele v. Pritchard, ante 263, a recent case, in which the same principle was involved, I held that the deceived party was entitled to be placed in the same position, in so far as damages could do it, as he would have been in if the representations had been true. Neither in that case nor in the present one were counsel able to refer me to any authority at all in point. I have, therefore, nothing to guide me but the general principle, which appears to me to be sound, that a man who made a false representation, intending another to act on it, is bound to make that representation good if the other does so act upon it. I think, therefore, that the plaintiff is entitled to recover as damages the difference between the profits which the defendant represented to the plaintiff that they had made and which he might reasonably expect to make and the profits which he actually did make, after making due allowance for differences in management and other circumstances.

The evidence shews that the plaintiff was somewhat unpopular, and I am satisfied that the falling off in receipts was, in some measure, due to the change in management. That fact must be considered in assessing damages.

Taking all things into consideration, I assess the damages at the sum of $1,500. There will, therefore, be judgment for the plaintiff for $1,500 and costs.

I want to say that I am satisfied the female defendant acted entirely at the instigation of her husband, the male defendant, and that he it was who concocted the fraudulent scheme to deceive the plaintiff. I think it is a case where the male defendant's share in the transaction might well demand the attention of the Attorney-General.

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MATHERS, J. MAY 1ST, 1907.

TRIAL.

DIXON v. CRAIG.

Contract — Sale of Business — Condition Annexed to Agreement for Sale as Part of Consideration—Breach—Damages —Measure of—Scale of Costs.

In June, 1905, the defendant, who was then a merchant carrying on business in Minnedosa, purchased from the assignee thereof, the electric lighting plant in that town, and began to operate it. On 4th July following he sold his mercantile business to the plaintiffs, and they at once went into possession. The parties had some difficulty in arriving at an agreement as to the price to be paid. The price asked by the defendant was 100 cents on the dollar, and the plaintiffs offered 90 cents. Finally the plaintiffs came up to 95 cents, and the defendant dropped to 97½. After some further negotiations the defendant suggested that he would require a large quantity of wood in the operation of the electric lighting plant; that wood was brought into town by the neighbouring farmers; and that he would appoint the plaintiffs his agents to pay for all wood which he bought. The plaintiffs then agreed to take the stock at 97½ cents.

A written agreement was drawn up and executed, one clause of which provided that so long as the defendant owned the electric lighting plant the plaintiffs were to be his agents to pay for all wood that might be bought by the defendant or his agents for the use of that plant. Both parties agreed that this clause meant that all wood bought for the plant by the defendant must be paid for through the plaintiffs, and that the defendant had not the right, under the agreement, to pay the vendor direct for wood so bought.

This action was brought for damages for breach of this provision in the agreement.

T. L. Metcalfe and H. B. Robinson, for plaintiffs.

R. A. Affleck and E. M. Pearson, for defendant.

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MATHERS, J.:—From the date of the agreement until this action was brought the defendant used for the electric light plant 579 cords of wood, but he only paid through the plaintiffs for 141 cords, and from the time the action was brought until the trial about an equal amount of wood was used, but only a small proportion of it was paid through the plaintiffs. The defendant found it necessary in order to keep the electric works supplied with wood to purchase in large quantities. He says he found the quantity delivered by farmers in single load lots insufficient for his purposes, and in November, 1905, he contracted for 500 cords from one Brown, a merchant at Clan William. The plaintiff Dixon, hearing of this purchase, objected to paying for wood bought in that way, and the defendant paid for it direct. Another considerable lot was bought from a man named Hillstrand, who assigned his claim to the Union Bank. The plaintiffs demurred to paying for this wood, but finally did so. On 12th December, 1906, some time after this action was brought, the defendant gave one Thompson an order on the plaintiffs for $175 for wood purchased, which the plaintiffs paid, but they at once wrote the defendant a letter of protest in which they say: "This we have paid, but we beg to notify you that this wood was not purchased in accordance with our agreement with you, and we will refuse any further orders covering wood purchased in this manner." What the plaintiffs meant by saying that the wood was not purchased in accordance with the agreement was that it was bought in a large lot, and not in small or single load lots from neighbouring farmers. It is quite manifest from this letter, as well as from the evidence of the plaintiff Dixon, that such was his understanding of the agreement. He thought the defendant was bound to buy in small lots, and that in buying in large quantities he was committing a breach of agreement. It is quite clear, however, that the agreement does not mean any such thing, and it was not contended at the trial that it was capable of any such construction. As to the purchase of the Brown wood, the plaintiffs objected to paying for it, and cannot now be heard to complain that it was not purchased through them.

It was given in evidence that 150 cords of wood were bought by the defendant from one Turner and paid for by the defendant direct. It was attempted on behalf of the defendant to shew that, although the written agreement to

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purchase this wood was dated 10th July, four days after the sale by the defendant to the plaintiffs, the actual purchase took place before, and therefore it was not wood which was to be paid for through the plaintiffs, as the agreement only applied to wood "which may be bought" by the defendant. There were negotiations for this wood before 4th July, but I am satisfied that the contract of purchase was not completed until the day of the date of the written agreement. The defendant, after relating the negotiations for the wood, says the matter was to be settled first time Turner came to town. At that interview then the matter was not concluded. Something remained to be settled. There is no evidence of any other negotiations until the document was signed on 10th July. This wood was, however, to be, and as a matter of fact was, delivered in the following December and January. The quantity actually delivered was about 148 cords. On 12th December the plaintiffs had notified the defendant that they would not pay for wood bought as the Thompson wood was bought, that is, in large lots. This purchase was larger than the Thompson purchase. I think, therefore, the defendant was justified in assuming that the plaintiffs' objection applied to this purchase and in paying for it direct; and that the plaintiffs are estopped by their conduct from now asserting that this wood should have been paid for through them.

It was argued that, although this was a large purchase, it was delivered in single loads, and therefore was not such a delivery as the plaintiffs objected to. Turner says he delivered it at the rate of about 4 cords per day. There is no evidence that he was paid for each load as it was delivered, and, as the contract was an entire one, the presumption would be that he was paid for it upon completion of delivery.

There remains to be considered 3 instances of the purchase of wood which were paid by the defendant direct, namely, about 30 cords from a man named Neilson and about 25 cords from two farmers named Moad. In paying for the wood bought from these three persons direct, the defendant was guilty of a breach of the agreement, and it is only a question of what damage the plaintiffs suffered because of these breaches. Neilson is not a farmer, but is the owner of a butter factory in town. He was called as a witness by the plaintiffs. He stated that he did not think that paying for his wood through the plaintiffs would have

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made any difference, that he always dealt at the plaintiffs' store anyway. It is impossible to hold on that evidence that the plaintiffs suffered any damage because of the manner in which the Neilson wood was paid for. On the other hand, had the wood purchased from the Moads been paid for through the plaintiffs, profit might have resulted to them. The amount so bought was 25 cords. It is not shewn what the price was, but $3 per cord appears to have been about the average price, and, assuming that half of the price of the wood would be taken in trade, that would be $37.50. The plaintiffs' profit would be 40 per cent., or $14.

It was argued on behalf of the plaintiffs that strict proof of their damage should not be exacted from them, but that damages should be assessed on a liberal scale. The plaintiffs are not in a position to ask for damages at all until they have established breaches of the contract probably resulting in damage in respect of which they are entitled to be compensated. I have dealt with the only concrete instances of a violation of the contract given in evidence. I am not satisfied from the evidence that there were any others, much less that such others, if there were any, resulted in damage to the plaintiff. I cannot therefore see any basis on which I can assess larger damage than the probable amount accruing from the Moad sales, an amount well within the jurisdiction of the County Court.

There will be a verdict for the plaintiffs for $14 and costs as of a County Court action at Minnedosa.

MANITOBA.

MATHERS, J. MAY 1ST, 1907.

TRIAL.

ROSS v. MOON.

Sale of Goods — Machinery — Action for Price — Contract — Delay in Delivery — Acceptance of Goods — Promise of Plaintiffs to Vary Terms of Contract—Failure to Deliver Parts of Machinery — Defendants Purchasing Missing Parts — Warranties — Sale of Goods Act — Machinery Reasonably Fit for Purposes for which Sold—Pleading—Amendment—Interest—Costs.

The plaintiffs, implement manufacturers of Brampton, Ontario, in 1903 sold to the defendants, farmers at Stock-

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ton, Manitoba, a threshing machine and engine, and brought this action to recover $2,125 and interest, as due on the machine; also to have a lien declared upon the defendants' lands.

Defendants set up that the machinery was to be delivered by 15th August, 1903, but was not delivered until 14th September, and some parts had never been delivered at all; that defendants signed the contract in blank, on the understanding that the agent was to fill it up; that the contract was that the machine was to be delivered f.o.b. at Winnipeg, whereas the agent put in f.o.b. at Brampton. Defendants also alleged that the machinery was defective and would not work, and did not fulfil the warranty given to them, of all of which they gave notice to the plaintiffs.

C. P. Fullerton and H. P. Blackwood, for plaintiffs.

H. A. Burbidge and E. A. Mackenzie, for defendants.

MATHERS, J.:—This is an action to recover the price of a threshing outfit. The plaintiffs are manufacturers of threshing machines carrying on business at Brampton, in the province of Ontario, and the defendants reside at Stockton, in the province of Manitoba. On 29th July, 1903, an agreement in writing was entered into between J. M. Ross Sons & Co., the plaintiffs' predecessors, and the defendants, for the sale to them of "A plain engine, straw burner, lagged, 8½ x 10, rated at 18 horse power; a three-way crank thresher with 36-inch cylinder, No. 56 body. The fixtures and extras as stated in price list;" also Gare Scott Feeder; High Weigher and Bagger; with straw carriers and hand feeder attachments, marked "J. M. Ross Sons & Co., Brampton, Ont.," subject to the terms and conditions hereinafter mentioned, at and for the price or sum of $2,125, payable as follows:—

"$ cash before shipment and purchasers' promissory notes as follows: $708 due 1st November, 1903; $709 due 1st November, 1904; $708 due 1st November, 1905; bearing interest at the rate of 7 per cent. per annum until due date, on last two notes only, and 10 per cent. per annum after due until paid, said notes to be signed and sent to the company at Brampton on receipt of machinery by purchaser, and no provision contained in said note shall in any way interfere with or supersede this agreement.

"And it is hereby agreed that unless the said cash payment is made and said notes executed and delivered (and

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satisfactory additional security given, if required) before the machinery is used and within 10 days after delivery of said machinery, then and in such case the whole contract price shall become due and payable forthwith, and the purchasers hereby covenant to pay the same.

"The company to deliver the said machinery f.o.b. cars at Brampton, Ont., addressed to Moon & Moon, Stockton station, C. P. Railway, on or about the 10th day of August, 1903, or as soon thereafter as the same is finished and car obtained, such shipment by the company to be complete delivery to and acceptance by the purchasers.

"The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely:—"It is warranted to be made of good material and durable, with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty, written notice shall within 10 days after starting be given to the company at Brampton, and the agent through whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if then the machinery or any of them cannot be made to satisfy the warranty it is to be returned by the purchasers, free of charge, to the place where received and another substituted therefor that shall satisfy the warranty, or the money and notes immediately returned and this contract cancelled, neither party in such case to have any claim against the other, and if no such notice is given within such time that shall be conclusive evidence that the said machinery is as warranted under this agreement, and that the machinery is satisfactory. . . . It is also agreed that the purchasers will employ competent men to operate said machinery.

"There are no other warranties or guarantees, promises or agreements, than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered, or, if the printed language of the above warranty is changed, whether by addition, erasion, or waiver, or if the purchasers shall in any respect have failed to comply herewith."

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Then followed the usual provisions respecting the property in the machinery remaining in the company until payment in full, and for accelerating payment in case of default, the insurance of the machinery against fire, that the purchasers should give a mortgage to secure payment, and for assignment of the earnings of the machine, and proceeds:—

"If from any cause not under the control of the company, said machinery is delayed beyond the time agreed for its delivery, no damage shall be claimed by the purchasers. . . . It is expressly agreed and understood that in the event of changes being made in machinery or terms mentioned in this contract, or in the security or extra security being taken or any change whatever, such changes are in no way to supersede or invalidate this contract, but it is to remain valid, binding, and in full force in all its clauses except in so far as relates to the specific clauses."

On the margin of the agreement these words were written: "150 endless 4 ply rubber belt endless at cost price."

On 26th August the plaintiffs applied to the Canadian Pacific Railway Company at Brampton for a car on which to ship the machinery. The car was delivered on the evening of the 28th August. On that day the defendant F. H. Moon sent and the plaintiffs received a telegram saying, "Machine not arrived, wire quick car number and date shipped." On the 29th the plaintiffs wired to F. H. Moon in reply, "Rig shipped on car 10309." As a matter of fact the machinery had not then been loaded on the car, but the car was there and everything ready to begin loading. When about to load it was discovered that the car floor was so badly out of repair that it could not be used. Another car was at once ordered, and upon its arrival the machinery was shipped on 5th September. On 10th September F. H. Moon again wired the plaintiff: "Machine not arrived, too late now to be of any use this." The sentence is incomplete, but it is evident the missing word is "year" or "season." On 11th September plaintiffs wired F. H. Moon: "Car 18463 with rig should be there now, trace it." On 14th September the machine did arrive at the C. P. R. station at Stockton, and defendants on that day wired to the plaintiffs: "Machine here. Will not accept unless you pay freight to Winnipeg and give us next year's terms."

The defendants did not take the machine off the car, and on 19th September J. M. Ross, the plaintiffs' president, ar-

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rived at Stockton and had an interview with defendants. According to the evidence of F. H. Moon, the reason then given for not unloading the machine was that the machine had not all come according to the contract, and also that it had arrived too late. "I said we would not accept unless he did something for us. We had not paid the freight. He said he would see that the freight was refunded, and everything made right, if we would unload." The defendant William Moon in his account of what took place says Ross wanted to know why we had not taken the machine, and was told it was not all there. He thought something was also said about freight. He also complained that it should have arrived a month earlier, and that they had lost a lot of threshing. Ross then said: "Take her off as soon as possible, and I will see that things are made right, and also attend to the freight."

The defendants then paid the freight, unloaded the machine, supplied the missing parts, some of which they had on hand and some of which they bought, and began threshing.

The parts claimed to be missing, as shewn by the defendants' letters to the plaintiffs dated 21st September, were short tongue for separator, hand-feeding attachments, fanner belt, drive belt, braces for bagger, doubletrees and neck-yoke for engine, governor belt for engine, tools except pipe wrench. It was also complained that a couple of valves on the engine were defective, and the glass was broken on the steam gauge. The plaintiffs admit that the hand feeding attachment and the drive belt were not shipped. There is nothing to shew what attachments or sundries should have been supplied. The contract says, "The fixtures and extra for each as stated in the price list," but the price list was not put in, so that I have nothing definite to guide me as to what minor equipment beyond what is specified should be included. I accept the plaintiffs' statement that the only tool supplied was a wrench, and that doubletrees and neck-yoke do not go with the engine, and the absence of a governor belt for the engine is not complained of in the defendants' statement of defence. The shipping bill shews that a tongue was shipped. I therefore find that the articles not supplied which were a necessary part of the equipment were, driving belt, hand feeding attachment, fanner belt, and braces for the bagger.

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The defendants procured a driving belt at a cost of $65. The fanner belt was worth from $2 to $3. There is no evidence as to what the braces for the bagger would cost, but it was probably a trifling amount. The hand feeding attachment was not procured by the defendants. It would cost about $15.

Before the machinery was unloaded, the defendants refused to give the notes mentioned in the agreement, upon the ground that some parts were missing, and on several other occasions they also refused to sign notes, on the ground that the machinery did not work satisfactorily.

The plaintiffs have sued upon the contract for the price of the machinery. By their statement of claim they allege the delivery of the machinery and extras according to the contract, but the evidence does not support that allegation. The driving belt, hand-feeding attachment, fanner belt, and braces for bagger were all included in the contract, and were each a necessary and material part of the threshing outfit. It was argued that the driving belt was something outside the contract and was not a part of it. It is true it was to be paid for at cost price in addition to the $2,125 named, but that does not make it any the less an essential part of the equipment sold. The plaintiffs would have no more right, in my opinion, to deliver a driving belt without an engine and separator, and insist on the defendants accepting and paying for it, than they would have to deliver these articles without the driving belt under this contract. It was not contended that the other articles omitted were not included in the agreement.

The plaintiffs have therefore failed to prove performance, on their part, of the agreement alleged, which performance was a condition precedent to their right to call upon the defendants for payment. The defendants had a right to refuse to accept the incomplete outfit when it arrived, and, had they adhered to their refusal, the plaintiffs would have been without remedy. They, however, did not adhere to this resolution. What was it that induced the defendants to change their minds and unload the outfit? According to the evidence of the defendants, the plaintiffs promised to refund the freight, which I take to mean the freight to Winnipeg, stipulated for in their telegram—and to making everything right. By making everything right they did not mean supplying the missing parts, because these parts would be required at once before the machine

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could be started. It was evidently the intention that the defendants should themselves procure these parts, and the best evidence that such was the intention is that they immediately proceeded to do so. I think therefore that what the parties meant by making things right was that an allowance should be made off the price for the missing parts. But the defendants would have the right to have this allowance made without any agreement on the plaintiffs' part. It therefore amounted to no concession at all. The defendants say that the allowance stipulated for as to freight was also agreed to by J. M. Ross. That would be a real concession, and I think it probable that J. M. Ross either expressly promised to make this allowance, or led the defendants to believe plaintiffs would do so, which is the same thing as far as they are concerned. I therefore find that to induce the defendants to accept the machine the plaintiffs agreed to pay the freight to Winnipeg and to make an allowance for the missing parts.

It was contended on behalf of the defendants that the written agreement was superseded by this new arrangement, and that the plaintiffs can now only rely upon an implied agreement to pay for what the goods received were worth, subject to the implied condition that they were reasonably fit for the purposes for which sold under sub-sec. (a) of sec. 16 of the Sale of Goods Act. The agreement itself, however, contains no answer to the defendants' first contention. It says: "It is expressly agreed and understood that in the event of changes being made in machinery or terms mentioned in this contract, . . . or any changes whatever, such changes are in no way to supersede or invalidate this contract, but it is to remain valid, binding, and in full force in all its clauses, except in so far as relates to the specific changes." The agreement then remains in force, varied as previously stated, namely, that an allowance should be made for the parts not supplied, and for the freight to Winnipeg. The recent case of Fairchild v. Rustin, not reported, is in no way at variance with this view, as the agreement under consideration in that case contained nothing equivalent to the stipulation above quoted.

It is also provided by the contract that "all warranties are to be inoperative and void in case the machinery is not settled for when delivered." By being "settled for" I understand is meant giving the promissory notes specified in the agreement. The clause quoted is preceded by a clause

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containing the vendors' warranty, and there is no doubt that this is the warranty which is to be inoperative and void under the circumstances named. The machinery was not "settled for when delivered," and therefore this warranty is inoperative and void, and the warranty being void all that follows respecting the steps to be taken in the event of the purchasers failing to make the machinery satisfy the warranty, and the consequences of failure to take such steps, is also inoperative. That part of the agreement would be absolutely meaningless without the warranty.

The agreement says that "all warranties are to be inoperative and void." In my opinion, however, this can only refer to the express warranties contained in the agreement, and any implied warranty under the 16th section of the Sale of Goods Act would still remain, unless, as provided in sub-sec. (d) of that section, the express warranty was inconsistent with the implied warranty under sub-sec. (b). The question of whether or not these warranties are or are not inconsistent is not free from difficulty, and the opinions expressed by the Judges in dealing with express and implied warranties similarly worded have not always been entirely consistent: North-West Thresher Co. v. Darrell, 2 W. L. R. 262, 15 Man. R. 553; Cockshutt Plow Co. v. Mills, 2 W. L. R. 355; and Sawyer v. Thibart, 5 W. L. R. 241.

I do not, however, feel called upon to decide the point in this case, as I have arrived at the conclusion that the machinery sold and delivered was reasonably fit for the purposes for which sold. So that, even if the defendants are entitled to invoke the implied warranty of reasonable fitness, the evidence satisfies me that the machinery was reasonably fit for the purposes for which sold.

No fault at all was found with the engine, and the only substantial fault urged against the separator was that it frequently became choked and would not clear itself. Two explanations were put forward, either of which might account for this choking. A wind stacker or blower was not part of the machinery sold, but the defendants put one on and so operated the outfit. The engine was 18 h.p., and, the plaintiffs say, was sold to drive the separator with straw carriers. They say they would not hold an 18 h.p. engine to run the separator and a wind stacker, which requires for its operation from 4 h.p. to 6 h.p. more than straw carriers do. And that the engine not being sufficiently powerful to drive the load the defendants put on it, might account for the

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choking. The other explanation has to do with the self-feeding attachment. Such an attachment, to do effective work, should be regulated by a governor. This is a device which prevents the self-feeding attachment from starting until the machinery has attained a certain speed, and causes the feeding to stop when it falls below that speed. The feeding attachment on this machine was equipped with governors, but the defendants did not know how to regulate them, and they therefore tied them up so that they were useless. The result was that the self-feeding apparatus started as soon as the separator did, and continued running without any reference to the speed at which the machine was being operated. Under such circumstances, unless the greatest care was exercised, the machine would be liable to become clogged by being fed too fast for the speed at which it was running.

Either of the explanations might, to my mind, reasonably account for the choking complained of by the defendants. I am satisfied, therefore, that if the machinery did not work to the satisfaction of the defendants, it was not because of any unfitness in the machinery itself, but was due to unskilful management on the part of the defendants.

It was objected at the trial that the defendant Frank Moon signed the contract in blank, and that the terms afterwards filled in by the plaintiffs were not those previously agreed upon between Frank Moon and A. H. Ross.

I have no hesitation, however, in holding that both the defendants knew exactly what they were signing, and that the written part of the contract is in exact accordance with the agreement arrived at.

The defendants paid $65 for a driving belt, which the plaintiffs should have supplied at cost. According to the evidence of J. M. Ross it would cost $40. The defendants are entitled to be allowed the difference, $25. The hand-feeding attachment was worth $15; fanner belt $3. There is no evidence of what the braces for bagger are worth, but I imagine $2 would cover them. The freight to Winnipeg was $100. The deductions which the defendants would be entitled to under the arrangement with J. M. Ross would therefore be $145.

The plaintiffs claim the interest provided by the contract to be paid in the event of notes being given. The notes, however, were not given, and the plaintiffs' right to recover depends upon the further provision in the agree-

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ment making in that event the whole purchase price due and payable forthwith. In this latter event there is no provision for the payment of interest. I have, however, power to allow interest as damages at the statutory rate.

As I before pointed out, the plaintiffs have failed to prove the contract alleged in their statement of claim, and cannot succeed without amendment. If they choose to amend by setting up variations made in the agreement by arrangement with J. M. Ross, and compliance with the contract so varied, they may do so within 14 days, in which event there will be judgment for the plaintiffs for $2,125, less $145, namely, $1,980, and interest at 5 per cent., but no costs.

If the plaintiffs do not amend within the time stated, the action will be dismissed with costs.

By their statement of claim the plaintiffs ask for a charge on the defendants' land, basing such right upon a provision in the agreement. This paragraph appears to have been left in the printed contract without either party intending it to be effective, and the plaintiffs' counsel abandoned that part of the claim at the trial. The judgment will therefore be in personam only.

The defendants' counterclaim is dismissed with costs.

BRITISH COLUMBIA.

(FERNIE.)

WILSON, Co.C.J. MARCH 22ND, 1907.

COUNTY COURT.

RE ROSS AND McCOOL.

Liquor License Act—Interpretation—Renewal of License—Discretion of License Commissioners—Refusal of Rehearing—Right of Appeal.

Appeals from decisions of license commissioners refusing to grant a rehearing under sec. 42 of the Liquor License Act, 1900, and renewing the respondent's license.

A. T. Fisher and F. C. Lawe, for appellants.

W. R. Ross and J. S. T. Alexander, for respondent.

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WILSON, Co.C.J.:—In August, 1906, the board of license commissioners for Fernie district granted McCool a license for his hotel building in course of construction at Elkmouth, but such license was not issued until 4th December, 1906, after the completion of the building. From that decision of the commissioners no appeal was taken, and McCool proceeded with his expenditure, the now appellants being neighbours, having necessarily full knowledge of what had been done and what McCool's intentions were. At the regular meeting of the license commissioners on 14th December, 1906, a renewal of the license was granted pro forma, there being no complaints lodged against the house, and the inspector's report being satisfactory. At that meeting a petition was presented by certain neighbours (the now appellants), alleging facts and grounds for the consideration of the board, which had not previously been before them, i.e., on the original hearing. The board unanimously refused to hear the case, and from that decision and from the board's decision renewing the license this appeal is brought.

First dealing with the decision of the board refusing to reconsider the case.

The proviso to sec. 42 of the License Act enacts: "Provided, nevertheless, that in cases in which the person or persons affected by such decision come before the board, and allege facts and grounds for their consideration not formerly before them, or in cases in which the board have not been unanimous, the board may, by resolution in which all the commissioners concur, decide to rehear the case." While the amendment of 1906, ch. 26, sec. 3, further enacts: "And provided also that an appeal from the decision of the said commissioners shall lie in all cases both as to law and fact," etc.

The contention of counsel for the appellants is that there is an appeal from a decision of the board under the first proviso in the section, but, in my view, that provision stands entirely by itself, and from a decision of the board no appeal lies. It is an absolute and certainly very emphatically expressed discretion placed in the hands of the board. In fact the proviso provides a special machinery for a rehearing by the board, and, unless that mode of bringing on the rehearing has been complied with, there is nothing that can come up on appeal. It is a discretionary method of allow-

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ing a rehearing, solely vested in the board itself. If they had unanimously decided to rehear the case, and had reheard it, then an appeal would lie from that decision, but not from the exercise of their discretion refusing to rehear.

The extent of the discretion of a court of first resort, even where not so positively expressed by statute, in allowing in new or additional evidence, is well shewn in the case of Jones v. Tuck, 11 S. C. R. 198. What is sought in this case is to produce additional evidence before the commissioners, and they, in their statutory discretion, refuse to allow a rehearing, and therefore refuse the admission of the new evidence.

Stress was laid in argument by counsel for appellants on the peculiar wording of sec. 14 of the Act. The last part of the section certainly seems somewhat peculiarly drawn, and at first glance the two parts of the section seem to clash. The argument is advanced that no license was granted (following the latter part of the section) until 4th December, 1906. But from my reading of the section the word "granted" in the last part of the section is intended to be used in the sense of "issued," otherwise the section would be nonsense, and that construction would be fairly placed on a section from its general purport which will give a sensible meaning. The section certainly is badly drafted, but, in my opinion, the decision of the board from which an appeal would lie was that decision given in August prior to McCool erecting his building, and in that view I necessarily interpret the latter part of the section as I do.

On the second ground there is nothing before me to justify setting aside the renewal of the license. The license on renewal issues practically as a matter of form on the inspector's report, and in addition to that no evidence was adduced before the board or before me which would justify the refusal to renew.

I must therefore dismiss the appeals.

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BRITISH COLUMBIA.

(VICTORIA.)

MARCH 23RD, 1907.

FULL COURT.

McDANIEL v. CANADIAN PACIFIC R. W. CO.

Railway — Animals Killed on Track — Negligence — Liability of Company — Animals at Large through Wilful Act of Owner—Railway Act, sec. 237, sub-sec. 4—"Or otherwise"—County Court Appeal—Defence not Pleaded in County Court—Leave to Amend not Applied for in County Court.

Appeal by plaintiff from judgment of County Court of West Kootenay dismissing action to recover damages for the killing of plaintiff's cattle upon the defendants' railway by the negligence of defendants as alleged.

The appeal was heard by MARTIN, MORRISON, and CLEMENT, JJ.

S. S. Taylor, K.C., for plaintiff.

E. P. Davis, K.C., for defendants.

CLEMENT, J.:—I would dismiss this appeal.

Mr. Taylor admits his inability to sustain the action otherwise than under sub-sec. 4 of sec. 237 of the Railway Act. It seems to me that the plaintiff's own evidence shews that the animals killed were at large through the wilful act of the plaintiff himself. He had no enclosure upon his own place within which to keep these animals; he simply turned them loose to pasture on the unfenced countryside. This is perhaps not a case of animals at large through the "negligence" of the owner; but these animals clearly "got" at large through the plaintiff's "wilful act" in turning them loose, as I have said. The plaintiff's own evidence shewing this, it seems idle to discuss where the onus lies. It can scarcely be seriously contended that the defendants should prove the fact over again by evidence formally called for the defence.

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I express no opinion upon the point taken by Mr. Taylor that the words "or otherwise" near the beginning of the section are to be construed as meaning "or otherwise at large." I simply assume in his favour that this is the correct interpretation of those words. If they mean "or otherwise upon the highway," as Mr. Davis contends, the plaintiff could not invoke the section at all, as there were no highways in the locality in question here.

Nor would it be proper to express any opinion upon the contention put forward by Mr. Davis that the sub-section in question cannot apply except in localities where there is the statutory obligation to fence under sec. 199. I base my decision solely upon this: that, assuming sub-sec. 4 to apply, the plaintiff's own evidence puts him out of Court. And, with all deference, I find myself unable to concur in the view expressed by my brother Martin that the defendants should not be allowed to urge this defence. It seems to me that the judgment of the County Court Judge really proceeds upon the same ground as that upon which my opinion is based, and all such amendments of the record must, I think, be taken to have been made as were necessary to present the point upon which, as I have said, the judgment below really proceeded.

Moreover, in this particular case, there can be no pretence of unpresented testimony which might by any possibility shew the facts to be other than they now appear upon the record (I mean, of course, as to this particular point), and I must confess my mind revolts at the idea of allowing this plaintiff to take money from the defendants' pockets to which he is, on his own shewing, not by law entitled.

MORRISON, J.:—I entirely agree with the judgment of the County Court Judge. The plaintiff's own evidence shews conclusively that he exercised no kind of supervision or control over his horses and cattle. It goes further, and, in my opinion, precludes any chance of there having been a breach on the part of the defendants of any statutory obligation which led to or caused the accident.

Having regard to the scope of the Act, I would fancy that there is a duty cast as well upon the plaintiff as upon the defendants to safeguard the travelling public from accidents of this kind.

I would dismiss the appeal.

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MARTIN, J.:—On this appeal from the County Court of West Kootenay the defendants seek to set up for the first time two defences which were not among the many defences raised by the lengthy amended dispute note in the Court below, nor was any application ever made to that Court for leave to further amend so as to raise them. One of these proposed defences is the alleged "negligence or wilful act" of the plaintiff under sec. 234, sub-sec. 4, of the Railway Act, 1903; and the other is that under the defendants' special charter no general Railway Act since 1879 has any application to them, and consequently they are exempt from the liability sought to be imposed on them by that section. This is the same point which is now standing for further argument before this Court on an appeal from my judgment in Northern Counties Trust Investment Ltd. v. Canadian Pacific R. W. Co. The appellant objects to these defences being now raised, as being a contravention of the statutory County Court Rule No. 159, under sec. 165 of the County Courts Act, as follows: "No defendant, whether by original action or counterclaim, shall be entitled to use or rely upon any ground of defence, set-off, or counterclaim other than those stated in the dispute note or reply, without the leave of the Judge, to be granted upon such terms (if any) as may appear just."

This, as I said in Gelinas v. Clark, 1 M. M. C. 428, 8 B. C. R. 42, is "a useful rule," and has frequently been given effect to. In that case it was applied by this full Court (McColl, C.J., Irving and Martin, JJ.), even to a question of jurisdiction open on the face of the record, as well as to a question of fact, abandonment. The counsel for the present respondents there took the ground that "if the objection to jurisdiction is not taken in the dispute note it is waived." It is unnecessary to allude here to the cases I noted at p. 433, but it is proper to point out that the decision in Gelinas v. Clark was again and recently approved and followed by this Court in Gabriel v. Jackson Mines Ltd., unreported, decided on 9th November, 1906, by Irving, Martin, and Morrison, JJ., wherein an application to raise for the first time on appeal (from the same Court now appealed from) several questions of fact and of law going to the whole root of the matter, was unanimously refused. I then in substance said as explanatory of the above decisions and of our ruling in that case: "This is not an appeal from a court of original jurisdiction, but one of statutory

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and inferior jurisdiction, and the rule has been treated by us as different—even as to a waiver of jurisdiction. The County Court is supposed to be a poor man's Court, and finality and expedition are aimed at."

This Court has laid it down in Jordan v. McMillan, 8 B. C. R. 28, that it is bound to follow its own decisions (see also Clabon v. Lawry, 2 M. M. C. 38), and I am unable to perceive why a defendant should now be allowed to set up at the eleventh hour a railway statute when he would not heretofore have been permitted to invoke, say, the Statute of Frauds, or the Statute of Limitations, and consequently I am of the opinion that the present defendants should be, as others similarly situated have been, confined to the record since they neglected to apply to the Judge below for the necessary amendment. During the hearing below the plaintiff's counsel repeatedly refused to be drawn into the question of negligence, as is shewn, e.g., on pp. 59, 60, 61, 63, 64, and 65 of the appeal book, and though the defendants' counsel did apply to amend the pleadings, if necessary, on the one point of "injury sustained by reason of the construction of the railway," he refrained from doing so on any other, which supports the appellant's present attitude. Such being the case, I do not think this Court should be drawn into a speculation regarding evidence which might have been given on non-existent issues. The appellant's counsel assured us that if negligence had been in issue he had other witnesses to call, and I do not see how, in the circumstances, we can refuse to accept this statement. The case of Stillaway v. City of Toronto, 20 O. R. 98, cited by the respondents, does not support their contention, for leave was there asked for; and further it was not a County Court case. I have not overlooked the remarks of Mr. Justice Duff in Stone v. Rossland Ice and Fuel Co., 12 B. C. R. 66, but in the first place they are obiter dicta, for the point was not raised or mentioned on that appeal; and, in the second place, he does not refer to the prior decision of this Court in Gelinas v. Clark nor to the special practice of the County Court.

I turn then to the sole remaining question, viz., the meaning and effect of the words "or otherwise" in sub-sec. 4. Now, if I were called upon to construe for the first time this language in the light of all the sub-sections of sec. 237, which stands by itself under the heading "Animals at large," I should not hesitate to put upon it that meaning

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which seems to me to be the manifest intention of Parliament, viz., "Animals at large upon the highway or otherwise at large." In the case at bar this construction includes the plaintiff's animals, and he would be entitled to recover if the company did not establish the defence open to them under the latter part of the section. This section came into force on 1st February. 1904, and several cases on it have been cited to us, decided in the following chronological order: O'Donovan v. Canadian Pacific R. W. Co. (10th January, 1906), per Cumberland, Co.C.J., of Minnedosa, Manitoba; Arthur v. Central Ontario R. W. Co. (10th March, 1906), 11 O. L. R. 537, 5 Can. Ry. Cas. 318; Bacon v. Grand Trunk R. W. Co. (1st May, 1906), 12 O. L. R. 196, 5 Can. Ry. Cas. 325; and Carruthers v. Canadian Pacific R. W. Co. (22nd October, 1906), 4 W. L. R. 441.

The first of these cases is a County Court decision in favour of the defendant company; the second and third on the facts as there given support the plaintiff's contention; while in the fourth there is much that the defendants are entitled to rely on. Seeing that there is such a conflict of authority in Courts whose decisions are not even binding on us, the only thing to do is to give effect to my own opinion as above stated. All the Courts are agreed in one thing, viz., that Parliament has been for years extending the liability of railway companies in this respect, and the only question is as to the extent it has gone. There has to my mind been a change in the law which must be recognized, and I cannot see that the clear liability imposed by the new sub-section can be cut down by reading it with sec. 199 so as to restrict its application to cases where there is a liability to fence. The omission of the words "or otherwise" after "highway" in sub-sec. 1, and the unqualified expression "got at large" in the eighth line of sub-sec. 4 support this view. "If," as was said in the Bacon case, "the law presses too hard upon the railway companies, it is for the legislature to interfere."

It follows that the appeal should be allowed with costs.

Appeal dismissed; MARTIN, J., dissenting.

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NORTH-WEST PROVINCES.

(CALGARY.)

HARVEY, J. DECEMBER 10TH, 1906.

TRIAL.

BECKER v. CANADIAN PACIFIC R. W. CO.

Railway — Animals Killed on Track — Liability of Railway Company — Railway Act, 1903, sec 237, sub-sec. 4 — Animals at Large through Negligence of Owner—Absence of Evidence that Horses Killed by Train.

Action to recover the value of two horses alleged to have been killed by a train of the defendants, the claim being made under sub-sec. 4 of sec. 237 of the Railway Act, 1903, which is as follows:—

"When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover."

J. E. Varley, High River, for plaintiff.

R. B. Bennett, Calgary, for defendants.

HARVEY, J.:—On behalf of the defendants it is objected that there is no evidence that the horses were killed by a train of the defendants, and also that the evidence shews that the horses were at large through the negligence of the plaintiff. The evidence discloses that the horses in question were found by the defendants' section foreman on the defendants' right of way about a quarter of a mile from a highway crossing, that the fences were in good repair, and

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that the cattle-guards at the crossing were in good repair prior to a snow storm after which the horses were found and which filled the guards up. They were not identified by the plaintiff as his until several weeks after; and in the meantime the section foreman had advertised them in the post office. There was no evidence as to how the horses came to their death nor any evidence of any external violence, and I have very grave doubts whether an inference that the horses were killed by a train could be justified.

In McMillan v. Manitoba and North-Western R. W. Co., 4 Man. L. R., witnesses' attention was called to a train by hearing it whistling the alarm for cattle. It then stopped 100 yards from the place where the first of the cattle were found, and remained standing and whistling for a short time, during which witnesses heard "some loud talk and swearing as to cattle being on the track," and then it started slowly, the engine still whistling, and then stopped again after having passed the place where the cattle were found. The whistling then ceased. The cattle were found badly injured a couple of hours later, having been last previously seen the night before. The Court held that there was no evidence that the injury was done by this train. Without expressing concurrence with that judgment, it appears to me that the necessary inference in that case would be more justifiable than in the present case.

I was at first of opinion that the fact of the defendants' employee advertising the fact of the death of the animals could be treated as evidence of the killing by the train, in view of the provisions of ch. 83 of the Consolidated Ordinances of 1898, requiring notice in the event of stock being killed by a train; but a reference to that Ordinance shews that the notice was not by the officer nor in the manner prescribed by the Ordinance, and it appears to me therefore that it cannot be so treated. I do not, however, consider it necessary to decide this point, because I am of opinion that defendants must succeed on the other objection.

The sub-section in question was originally a sub-section of sec. 194 of the former Railway Act, that section relating to the duty of a railway company to erect and maintain proper fences, cattle-guards, etc., and their liability for failure, now covered by sec. 199 of the present Act, while the other portions of sec. 237 are a continuation of sec. 271 of the old Act, and relate to the duty of owners of animals to keep such animals off the highway near a railway and

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to the penalties for breach of this duty, which provisions, as has often been said by the Courts, are for the protection of trains and people travelling in them.

These two parts of the section at first glance, and their history, suggest two different purposes and an anomaly in their being joined in one section. There must, however, have been some reason for dissociating sub-sec. 4 from the section where it was originally found, and placing it in a section having a different purpose; and a more careful examination of the sub-section points to an interpretation consistent with the other parts of the section. The first three sub-sections impose conditions for the purpose of preventing accidents to trains by running into animals at the crossing of highways, but there is no provision for the much larger portion of the railway within the company's own land. Provision has been made for fences, cattle-guards, etc., having no doubt the double purpose of guarding trains and protecting owners of animals, and it appears to me that this sub-section may be reasonably construed as indirectly imposing on the company the obligation to take such other precautions as may be necessary to prevent animals getting on their land by making them liable for any injury caused by their trains. The alteration of the sub-section seems to support this view. Formerly, for the owner of an injured animal to recover, the burden was on him to shew negligence on the part of the company. Now, negligence on the part of the company is immaterial, and the company, to avoid liability, must shew negligence on the part of the owner, prima facie the company being liable. Having in view then the obligation imposed on the owner by the first portion of the section and on the company by the second portion of the section, the question to be determined is whether the evidences establishes such negligence on the part of the owner as disentitles him to recover.

The evidence establishes that some time at the end of summer or in the fall, the date being somewhat uncertain, but as far as can be fixed about September, the horses in question were driven about 16 or 17 miles from High River, where the accident occurred, and placed in a pasture consisting of two sections of land. The evidence, which is that of the plaintiff and his son, is not very explicit as to the extent to which this tract of land was enclosed. It is clear, however, that on one side there was a river, while on the other sides, whether completely or not is not certain, it

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was fenced. There were road allowances running through the tract, across which there were wire gates of a certain fashion. The pasture was not the property of the plaintiff, but was used by different persons for pasturing animals in a general sort of way, it being necessary for people passing along the road or putting animals in or taking them out to open the gates. The road from the pasture to High River and the railway was fenced. The plaintiff had other horses in the same pasture, but no one was left in charge of them. His son, however, was in the habit of going out once or twice a week to look after them, apparently to see if they were all right. Some 3 or 4 weeks after the horses in question were placed there, it was discovered that they were missing.

Some inquiries and searches were made, but apparently no serious effort was made to find the horses, and on 28th or 29th November the horses were discovered by the defendants' section foreman dead on the defendants' right of way. This may have been very soon or may have been several weeks after they escaped, the evidence not being sufficient to say, since the plaintiff had no idea they were his horses until several weeks after they were found. If there were no duty on the plaintiff to keep his animals from getting at large, inasmuch as it is the custom of the country to allow animals to be at large, no negligence could be ascribed to him for the horses being at large, since his attempt to keep them in the pasture could be considered only as for his own convenience; but, inasmuch as the first sub-section of sec. 237 imposes on him, as regards the railway company and probably those travelling on the railway, the duty of preventing his animals from being at large, as far as the railway company are concerned, it was his duty to take reasonable precautions to keep his horses in confinement or under control. The going out to the place in question once or twice a week would be valueless to keep the animals in charge and could only be intended to guard against them getting far astray. It appears to me that the fact of the plaintiff considering it necessary to send some one out in this way shews that he did not consider them securely confined, and I cannot see how, on the evidence, any one would come to any other conclusion.

As I have said, I should not consider this negligence in the absence of any special duty; but, even if it were not negligence, it was the wilful or deliberate act of the plain-

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tiff in putting the animals where he did that was the cause of their getting at large, if indeed they were not at large even in that pasture, and therefore they were at large through the negligence or wilful act or omission of the plaintiff, and thus come within the exception which excuses the railway company. The action is therefore dismissed.

NORTH-WEST PROVINCES.

(CALGARY.)

HARVEY, J. DECEMBER 18TH, 1906.

TRIAL.

FRANK v. GAZELLE LIVE STOCK CO.

Promissory Note—Document Purporting to be such, but with Addition of Memorandum—Property in Goods for which Note given not to Pass until Note Paid — Non-negotiable Instrument — Indorsement — Invalidity as Assignment of Agreement — Action by Indorsee — Dismissal — Costs.

Action on a document in the following terms:—

$3,000 xx /100 Innisfail, N.W.T., June 16th, 1903.
One year ..... after date I promise to pay the order of J. H. Truman For The Pioneer Stud Farm
Bushnell Ill.
J. G. Truman Mgr
at the UNION BANK OF CANADA here the sum of Three Thousand .....xx /100 Dollars
Value received Gazelle Live Stock Co.
Given for Suffolk Stallion "His Grace." Frank W. Malcolm
Same to remain property of J. H. Truman Manager.
until this note is paid.

This document had indorsed on the back the following:

Without Recourse
THE PIONEER STUD FARM
J. G. Truman Mgr.
Pay to the order of
Fredk. Frank
F. Frank

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The plaintiff claimed upon this document as a promissory note, or in the alternative as an agreement, the rights under which accrued to him as a member of the partnership, the Pioneer Stud Farm, upon its dissolution and a division of the assets.

Several objections were taken by the defendants, the first of which was that the document in question was not a negotiable promissory note, and that therefore the plaintiff, without a valid assignment in writing, could maintain this action, whether the document was treated as a promissory note or not. There was no evidence of any written assignment of the document unless the indorsement above set out constituted such an assignment.

R. B. Bennett, Calgary, for plaintiff.

W. T. D. Lathwell, Calgary, for defendants.

HARVEY, J.:—In Dominion Bank v. Wiggins, 21 A. R. 275, it was held by Mr. Justice Maclennan, with the concurrence, as he states, of the other members of the Court of Appeal, that a document purporting to be a promissory note, but containing a provision that the title and right to possession of the property for which the note was given should remain in the owners, the payees of the note, until the note was paid, was not a negotiable promissory note, on the ground that it was not an absolute, unconditional promise to pay. In Bank of Hamilton v. Gillies, 12 Man.L.R., the Court of King's Bench of Manitoba held that a document purporting to be a promissory note, containing a somewhat similar provision to that in the Wiggins case, was not a promissory note. The decision in this case, however, did not go on the same ground as in the Wiggins case, Chief Justice Killam stating that he was not satisfied with the reasoning of Mr. Justice Maclennan in that case. The ground of decision, however, in this case was similar to that in Kirkwood v. Smith, [1896] 1 Q. B. 582, namely, that the Bills of Exchange Act, sec. 82, having indicated what conditions and additions may be made to a promissory note without destroying its negotiability, impliedly negatives any other conditions or additions, and that, as such a provision as this above stated does not come within the provisions of that section, the document, by including such provision, ceases to be a negotiable promissory note. In Prescott v. Garland, 34 N. B. R. 291, the Supreme Court of New Brunswick

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arrived at the same conclusion as in the two foregoing cases, the different Judges taking both grounds.

If the present case comes within the principle of these decided cases, whatever might be my personal view, I should hesitate to disregard the decisions of the highest Courts in three of our provinces and the decision of the English Divisional Court, which have been followed in our own Courts in Imperial Bank v. Bromish, 16 C. L. T. Occ. N. 21, and New Hamburg Manufacturing Co. v. Weisbrod, 4 W. L. R. 125.

It is true that in none of the cases mentioned were the circumstances exactly the same as in this case, as is seen by reference to the document itself. The added provision is simply a short memorandum at the foot of the document, and does not take the form of an agreement between the parties and signed by the maker, as in all the other cases, and I have endeavoured to make a distinction on this basis; but, after very careful consideration, the only conclusion I can come to is that the statement of the memorandum, "Same to remain property of J. H. Truman until this note is paid," can be treated as nothing but an agreement between the parties to the instrument, and, that being the case, it appears to me that it is entirely covered by the principle in Bank of Hamilton v. Gillies and Kirkwood v. Smith, and that I must therefore hold that the instrument sued on here is not a negotiable promissory note. That being the case, the rights of the parties under it could not be assigned by a simple indorsement, so that, even if the indorsement in question were a valid indorsement, which is contested by the defendants, it would not confer any rights on the indorsee, and I cannot see that the plaintiff's position in this respect is any better on his alternative claim than on the original claim.

It was suggested on the argument that in any event the defendants should not be entitled to their costs of action because of their conduct in connection with the transaction. I consider that the conduct of one or more of the members of the company was at least somewhat peculiar, but there are other members of the company who, in my opinion, have acted entirely properly and regularly throughout the whole transaction, and I do not see how the company itself should be affected and prejudiced by the acts of individual members. I may say, too, that the conclusion I come to, from the evidence regarding the giving of the note, is that at the time

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the note was given to Mr. Truman, the company were not in a position to do business, but that Mr. Malcolm, the manager, who then gave the note, was thoroughly satisfied that within a year they would be able to do business, and would be willing to take the horse in question, and that the sale was made and the note given entirely with that knowledge and understanding. Such being my conclusion as to the circumstances, I see no reason why the defendants should be denied their costs of action. Judgment will therefore be for the defendants with costs.

NORTH-WEST TERRITORIES.

(CALGARY.)

HARVEY, J. DECEMBER 19TH, 1906.

SINGLE COURT.

RE BROWN AND CITY OF CALGARY.

Municipal Corporations—Regulation of Retail Stores—Early Closing By-law — Powers of City Council — Provincial Statute—Intra Vires—Trade and Commerce — Delegation of Discretion as to Hours and Penalty — Unreasonable By-law—Excessive Penalty—"Legal Holiday"—Movable Dates—Authority outside By-law—Conformity of Penalty Clause with Powers given—Prior By-law—Implied Repeal —Discrimination.

Application to quash by-law No. 705 of the city of Calgary, which was as follows:—

By-law No. 705.

A by-law to provide for the early closing of certain retail stores.

Whereas a petition has been presented to the council praying that it be enacted as hereinafter contained.

And whereas the council has decided and determined upon the proper list of persons carrying on retail stores and places of business within the city.

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And whereas it has been proved to the satisfaction of the council that the said petition has been signed by at least three-fourths of the persons so carrying on retail stores or places of business within the city aforesaid.

Therefore the council of the city of Calgary enacts as follows:—

1. Every person carrying on a retail store or place of business within the city of Calgary, with the exception of those persons carrying on the business of a newsdealer, tobacconist, druggist, or licensed victualler, shall keep such retail store or place of business closed from 6 p.m. until 7 a.m. on Monday, Tuesday, Wednesday, Thursday, and Friday in each and every week, and from 11 p.m. on Saturday in each and every week until the hour of 7 a.m. on Monday morning, and from 11 p.m. on the day preceding a holiday until the hour of 7 a.m. on the day following such holiday, except again as hereinafter mentioned, and no such person shall, during the hours aforesaid and in his said store or place of business, sell or agree to sell or offer to sell to any person whatever nor accept any order for any goods, wares, or merchandise.

2. This by-law shall not apply to any person carrying on the business of a fruiterer, confectioner, or baker, except in the case where such person carries on such business in conjunction with some other retail business, in which case such person shall keep that portion of his store or place of business in which such other retail business is carried on closed during the hours and times set forth in clause 1 hereof, and shall not, during such hours in his said store or place of business, sell or agree to sell or offer to sell to any person whatever nor accept any order for any goods, wares, or merchandise, except such as are usually sold by confectioners, fruiterers, or bakers.

3. The expression "legal holiday" shall include New Year's day, Good Friday, Arbor day, Victoria day, Christmas day, the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign, Dominion day, Labour day, Thanksgiving day, and any other day proclaimed by proper authority a public holiday within the city of Calgary.

4. This by-law shall also apply to the selling of goods by auction in retail stores or places of business.

5. This by-law shall not apply to the 7 days next preceding Christmas day in each and every year.

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6. Any person guilty of an infraction of this by-law shall be liable on summary conviction to the penalties prescribed by section 149 of Ordinance number 33 of 1893 of the North-West Territories, but before any person shall be convicted of an infraction of this by-law it must be proven that such person did, during the hours hereinbefore mentioned in his store or place of business, sell or agree to sell or offer to sell or accept any order for an article of goods, wares, or merchandise not usually sold by a newsdealer, tobacconist, confectioner, fruiterer, druggist, or licensed victualler.

Done and passed in council this 29th day of October, A.D. 1906.

J. Emerson, Mayor.

(Seal)

H. E. Gillis, Clerk.

W. F. W. Lent, Calgary, for applicant.

J. S. Hall, K.C., and W. L. Walsh, K.C., for the city corporation

HARVEY, J.:—The authority under which this by-law is attempted to be supported is contained in ch. 55 of the statutes of Alberta for 1906, whereby the following clause was added to the clauses defining the city council's power to pass by-laws:—

(86) For fixing, altering, and regulating from time to time the hours of opening and closing retail stores and places of business within the city, or certain portions thereof, and for exempting from the operation of such by-laws certain classes of business, and for imposing a penalty for breaches of such by-law.

Provided that before any such by-law is passed, a petition asking therefore must be presented to the council, signed by at least three-fourths of the persons carrying on such retail stores or places of business, and if any dispute arises as to the proper list of persons, the same shall be decided by the city council.

The first objection taken to the by-law is that it is invalid because the amending legislation above set out as clause (86) is ultra vires the provincial legislature and void, as affecting trade and commerce, the right to legislate on which is exclusively given to the Dominion Parliament by

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the B. N. A. Act. There is a mass of authorities, from the Privy Council decisions down, more or less directly touching this objection, many of which were referred to, the most recent being the judgment of Mr. Justice Archibald in the province of Quebec in Beauvis v. City of Montreal. This case is not yet reported, but a copy of Mr. Justice Archibald's reasons for judgment was handed to me. His judgment is that a similar provision of a Quebec statute is ultra vires. I am not at all in accord with the reasons given for this conclusion or with the conclusion itself.

Another very recent case to which my attention was called was a decision of the full Court of King's Bench of Manitoba, Stark v. Schuster, 14 Man. L. R. 672, which was decided in 1904 and held that an early closing by-law of the city of Winnipeg, founded on a similar provision of a Manitoba statute, was valid, and that the Act was intra vires. In this case the authorities are reviewed at length, and I shall content myself, without referring to them in detail, with accepting the decision in this case, which appears to me to be entirely in accord with the trend of the recent decision in the Privy Council and Supreme Court of Canada.

It is also urged that the Act is ultra vires because it delegates to the council full discretion as to the hours and penalty, by virtue of which the council might pass a prohibitive by-law.

This subject has been considered in Hodge v. The Queen, 9 App. Cas. 117, and Attorney-General for Ontario v. Attorney-General for Canada, [1896] A. C. 348, and is also considered in Stark v. Schuster, supra, and on these authorities I decide that this objection cannot be sustained.

As to the by-law itself, it is urged that it should be quashed because it is unreasonable and works a hardship on citizens and that the penalty is excessive. This objection was taken in Stark v. Schuster; and as to it, it is to be said, as was said there, that if the by-law is within the powers given by the Act of the legislature, effect cannot be given to such an objection, and it appears to me that the by-law is within the terms of the Act.

It is also objected that the by-law is bad by reason of paragraph 3, in which the term "legal holiday" is defined, inasmuch as several of the days so mentioned are not fixed dates. Good Friday is not a fixed date, but it is fixed not by the act of any person, and I presume the objection does not apply to it. The day fixed by proclamation for the cele-

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bration of the birthday of the reigning Sovereign, Thanksgiving day, and any other day proclaimed by proper authority a public holiday within the city of Calgary, are days which are not fixed by the by-law itself but are to be determined by some authority outside the by-law.

In Re Cloutier, 11 Man. L. R. 220, a conviction under a similar by-law of the city of Winnipeg was quashed, on the ground that the by-law was bad inasmuch as the holidays included "the days on which the exhibition of the Winnipeg Industrial Exhibition is being held," and were therefore to be determined by the exhibition board. Objection was made in that case to the holidays which were to be fixed by proclamation as in this by-law, but nothing was said about them in the judgment. Chief Justice Taylor, before whom the application was first made, refused to quash the conviction, holding that the by-law was valid, and it appears from his judgment that a previous unsuccessful application had been made to Mr. Justice Killam to quash the by-law. The Court of Appeal, however, reversed the Chief Justice's decision and declared the by-law bad. The judgment going entirely on the question of the holidays to be fixed by the exhibition board, I assume that the Court drew a distinction between that feature of the by-law and that which fixed holidays by proclamation by competent authority, but, if it did not, I prefer to follow the view held by Chief Justice Taylor. There appears to me to be nothing unreasonable in the provision of this by-law in the fixing of holidays nor any doubt as to what days are intended.

From the authorities quoted by Chief Justice Taylor, it appears that the Court has discretion as to quashing a by-law, even if it were objectionable on such a ground; and if it were necessary to exercise a discretion on this point, I should certainly exercise it to uphold the by-law, which, as I said before, appears to be perfectly reasonable and fair in this respect.

It was also objected that the penalty clause is not in conformity with the power given, as the offence is not for "keeping open" or "not closing," but is for "selling." I cannot accept this contention. The penalty is for an infraction of the by-law as authorized by the Act, but a provision is added whereby it is declared that it is to be a substantial and not a mere technical infraction that is to be punished. This may not exhaust the power given, but it

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is clearly within it, and is therefore, in my opinion, unobjectionable.

It is also urged on behalf of the application that there is a prior by-law dealing with the same subject, which is unrepealed. I cannot see any force in this objection. If a legislative body, municipal or otherwise, has power to legislate on a subject, it does not exhaust its powers by one Act, and a later Act must be given effect to, and, in so far as it covers the same ground, it will repeal by implication the prior Act if it is not repealed expressly.

It was also urged that the by-law should not be upheld because it discriminates between classes. This would be a perfectly valid objection if power were not given to discriminate; but it is clearly specified in the Act that certain classes of business may be excepted from the operation of the by-law, and the by-law in this respect does not, in my opinion, in any way go beyond the power given.

I am of opinion that none of the objections taken can be sustained, and the application is therefore dismissed with costs.

NORTH-WEST PROVINCES.

(EDMONTON.)

HARVEY, J. MARCH 8TH, 1907.

TRIAL.

FRASER v. KIRKPATRICK.

Husband and Wife—Earnings of Wife—Separate Property—Business Carried on by Wife with Assistance of Husband—North-West Territories Act — Married Women's Property Ordinance—Insolvency of Husband—Fraudulent Scheme to Defeat Creditors—Judgment against Husband —Execution against Property Standing in Name of Wife.

The husband of the defendant became insolvent in or about March, 1901. The defendant had started to work in a hotel as housekeeper about 1st January of that year, and leased the hotel and obtained a license about the time of

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her husband's assignment, and carried on in her own name an hotel business, her husband after about July of that year assisting in the business. About February, 1904, the defendant moved to Edmonton and engaged as a partner with another in a real estate business, the husband acting in the conduct of the business and generally as her manager and agent, and having a power of attorney to sign her cheques and execute documents.

Commencing with the money obtained in the hotel business, the defendant made a number of profitable investments.

The plaintiffs obtained a judgment against the husband in respect to an indebtedness incurred before he became insolvent.

This was an action to enable the plaintiffs to realize their judgment against the property of the defendant.

J. E. Wallbridge, Edmonton, for plaintiffs.

C. F. Newell, Edmonton, for defendant.

HARVEY, J.:—I do not see how Conger v. Kennedy, 3 Terr. L. R. 186, 26 S. C. R. 397, helps very much to a decision in this case. The question there was as to the terms of the Ordinance, whether it applied only to property acquired in a particular way or included other separate property. There is no doubt that a married woman, even apart from our Ordinance, could have separate property. That has always been the case, but she has been, of course, subject to certain limitations for a long time. Our Ordinance is very wide in its terms as regards removing those limitations. It was passed, however, at a time when sec. 36 of the North-West Territories Act was in force. That Act is limited to property acquired in a certain particular way. It says that property acquired in that particular way shall belong to a wife absolutely as her own. Now, I am not prepared to say that the legislature could not have interfered with that section. They could not have repealed it, there is no doubt about that; and they could not have restricted it; but I am not prepared to say that they could not have extended it in terms by saying that all the earnings of a woman acquired in any way, whether in a business carried on by her apart from her husband or one in which a husband takes part, shall be her separate property.

It appears to me the question to be determined is whether the present Ordinance, which does not say that in terms,

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does in effect say that. It says that a married woman shall, in respect of personal property, have all the rights of a feme sole. I am not sure that, in the absence of sec. 36 of the North-West Territories Act, I should not be disposed to hold that it did go that far, but, in the face of that section dealing with the subject of acquisitions by earnings, I cannot bring myself to the conclusion that the section intended to deal with acquisitions by earnings in any other way than that provided by the section of the North-West Territories Act.

Newell:—If your Lordship will pardon my interrupting, that point is raised all the way through in Conger v. Kennedy, and that was the ground taken by each one of the Justices except Mr. Justice Wetmore, who disagreed on that very point. The Supreme Court says it doesn't mean as they took it at all. The Supreme Court says it meant every property, as I contend, and notwithstanding that Act it extended to all kinds of property. That exact point comes right up in the case all the way through.

HARVEY, J.:—I do not see how it could come up, because I do not see how it could be argued then as it can be now. The point that I was making is not touched there, as it could not very well be touched, because it could not arise. The question which I was considering was simply whether this ever became the personal property of the defendant. In that case there was no doubt about the property having been the personal property of a married woman, but it was urged that as soon as she married, the property then passed out of her control and she had no rights of holding or disposition over it. That was the point that arose there. The question here is whether the property that was acquired in the hotel business ever became the separate personal property of the married woman in question, Mrs. Kirkpatrick. If it did, then the Ordinance would apply to it, and, as I said, perhaps, in the absence of that section of the Act, I might be disposed to hold that a share of it did if there were some way of determining the share, yet, in view of the Act in respect of earnings limiting the rights of the married woman to earnings acquired by business carried on by her apart from her husband, it seems to me that if that special matter is to be extended the Ordinance or Act must be clear on that subject. Apart from the Act and the Ordinance,

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there is no doubt that the earnings of a married woman would not be under her control; they would be the property of her husband, and could be taken for his debts, and the proceeds of them could be followed. As I say, I am not disposed to conclude that the Ordinance does extend the earnings of a married woman beyond the terms of the Act.

Then as to the facts of the case, the condition of affairs was that some time in March the judgment debtor Kirkpatrick made an assignment. At or about the same time, it does not appear as to the exact date, his wife went into the hotel business, and on 1st May she says she got a license. That is the only period that is definitely fixed. That was some time after the assignment. Then a very short time after, a month or possibly two months, her husband came and they carried on the business together. It is absurd to say, I think, that he was doing nothing but loafing around there and living simply as a parasite on his wife. I do not think there is any doubt about it that they were carrying on the business together; he was managing it and looking after the finances. I feel satisfied of that on the evidence, and the earnings therefore were the earnings of both.

After the hotel business was given up, they came to Edmonton. Then he went into a business in which the wife could not take any part. She put up the money out of the funds received from that hotel business. He carried on that business in the regular way, except that everything was done in her name. He had power of attorney to conduct the business for her, and he did all the business. He said he consulted her about everything, and it may be quite true. Any husband and wife who are living on proper terms would naturally consult with one another about any business dealings of any importance, unless perhaps one took no interest at all in such matters; but the whole circumstances in the case, to my mind, shew a clear intention on the part of the parties that there should not be any liability in respect of any debts of the husband, and that, I suppose, would be a fraudulent intent. It is possible that that might affect the question, even if the wife could have acquired that property, but, on the view I have taken of the law, I think that she could not have done so, and he was indebted at the time—I am assuming now, of course, that the debt will be proved in this case—and this was therefore a fraudulent scheme of which the intention was

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to prevent the enforcement of that debt, and naturally any other debt.

I think on the plaintiffs proving the indebtedness in this action they are entitled to judgment, and if the parties cannot agree as to the property there will be a reference to the clerk to ascertain the property. It is quite clear on the evidence before me that all the property the defendant has except the two lots in Strathcona were acquired from the proceeds of the hotel business. The judgment will be in favour of the plaintiffs on the indebtedness being proved. If it is not proved the action will be dismissed.

YUKON TERRITORY.

CRAIG, J. APRIL 30TH, 1907.

SINGLE COURT.

UNITED STATES SAVINGS AND LOAN CO. v. RUTLEDGE.

Costs — Unnecessary Proceedings — Foreign Commission — Pleading — Bona Fides — Discretion — Rules of Court.

Motion by defendant for an order disposing of certain costs.

F. J. McDougal and G. A. McPeake, for defendant.

F. G. Crisp, for plaintiffs.

CRAIG, J.:—This was an action tried in this Court, the cause of action being a foreign judgment obtained in the State of Washington, and the defence a general denial of all the allegations contained in the statement of claim, as well as special pleas: 1st, denying that the defendant was at any time subject to the jurisdiction of the Courts of that State; 2nd, alleging that the defendant was at no time, nor was any person authorized by him, served with any summons or writ in any action on which the judgment sued for was founded; 3rd, that the defendant had paid all the sums sought to be recovered under the judgment; 4th, that the Court was without jurisdiction to enter the judgment sued for; 5th, that in the alternative the defendant is only one

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of several defendants under said judgment, and is only liable to pay his portion of any costs recovered thereunder. There was also another plea of the Statute of Limitations.

Before trial the defendant was examined for discovery, and commissions were issued to the State of Washington to take evidence, first, to prove the judgment, next, the constitution of the Court and the effect of personal service and the status of the judgment there and the law as to limitations in that State affecting this judgment; also to take evidence in answer to the 1st, 2nd, 3rd, 4th, and 5th pleas, which I have above recited, put in by the defendant.

Upon the trial judgment was given for the plaintiffs, it being held by the Court of first instance here and afterwards by the Court en banc that the plea of the Statute of Limitations was of no avail; that ch. 29 of the Consolidated Ordinances of the North-West Territories did not repeal or affect the provisions of the statutes of James or Anne as to absence beyond the seas. On appeal to the Supreme Court of Canada this judgment was reversed, and it was held (so I am informed, although I have not seen the full text of the opinion of Court) that that statute is the complete law of limitations as affecting this Territory. Upon the trial it was announced by counsel for the defendant that the only defence offered or intended to be relied upon was the Statute of Limitations, and all the other defences raised by him were abandoned. This admission rendered useless and apparently unnecessary a great part, if not all, of the commission evidence taken in Washington.

The Supreme Court has referred to me the question of these costs in the following words: "And this Court did further order and adjudge that the question what, if any, costs should be payable by any party to the action on the final taxation hereof by reason of the issues raised by the 2nd, 3rd, 4th, 5th, and 6th paragraphs of the statement of defence and the taking of evidence in connection therewith be disposed of by the Honourable Mr. Justice Craig." I take it that this reference to me admits that I have jurisdiction. Upon the points whether I have discretion to allow such costs and the quantum of them as apportioned to the assertion or defence of the various pleas, I think there is no question as to the jurisdiction under our Rule 525, which is as follows: "Subject to the provisions of these Ordinances and the Rules of Court, the costs of and incident to all proceedings of the Territorial Court, including the

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administration of estates and trusts and compensation or allowance to any executor, administrator, guardian, or committee, receiver, or trustee, shall be in the discretion of the Court or Judge." And Rule 526 is: "When issues in fact and law are raised upon the claim or counterclaim, the costs of the several issues raised both in law and fact shall, unless otherwise ordered, follow the event." I take it that by the reference to me from the Supreme Court I have now the same jurisdiction to allow or disallow costs as I would have when sitting as a trial Judge upon this case if I had pronounced the same judgment as the Supreme Court afterwards did dismissing the action upon the one plea of the Statute of Limitations. It is clear to me that these pleas were raised simply to embarrass the plaintiff in his action and to delay. That appears upon a perusal of the evidence for discovery, which was the only evidence read at the trial except the commission evidence, and in that the defendant shewed an entire ignorance of his defences, and an entire ignorance as to whether any of the pleas raised by him were true or false. I think it would have been entirely unnecessary to issue any commission at all in this case if the defendant had relied upon the plea which he relied upon at the time of the trial, because the judgment of the Supreme Court turned solely (I believe and I am informed) upon the effect of our local Ordinance affecting limitations of actions. That must be so, because that was the only defence raised by the defendant on the trial or afterwards upon the appeal. The commission was obtained by consent of the parties, and I can find on the records no affidavit of the plaintiffs or their solicitors indicating on what lines their evidence would be taken upon which they asked for the commission; but I am compelled to believe now that the counsel for the defendant was fully aware of the object of the commission and might have prevented the plaintiffs from issuing one from this Territory if he had not wished to delay and embarrass the plaintiffs.

It has been argued that notice under our Rules 225 to 230 might have been given. Rule 225 was cited to me, but I do not believe that that was the Rule which the person citing it intended to rely upon. I think he must have meant Rule 227, where "a party may by notice in writing at any time not later than 12 days before the day fixed for the trial call on any other party to admit, for the purpose of the cause, matter, or issue only, any specific fact or facts

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mentioned in such notice, and in case of refusal or neglect to admit the same within 6 days after service of such notice, or within such further time as may be allowed by a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Judge is satisfied that the refusal to admit was reasonable." I think that Rule does not at all affect the general jurisdiction of the Court or Judge under Rule 525, formerly cited.

The only question now is how far the plaintiffs required a commission in their own behalf to prove any part of their own case. I think they unnecessarily pleaded in their statement of claim the due constitution of the Court, and that all they required to plead was a judgment. It may be a question of course whether their statement of claim amounts to any more than that, but there can be no doubt that the defendant was not acting bona fide in raising the defences which he did raise, as his examination for discovery clearly shewed. I think the Rule giving discretion to the Judge in cases of this kind is one which is meant to prevent unnecessary costs being incurred in raising defences which a defendant knows he cannot substantiate, and which there is not the slightest ground for believing are true in fact. I think this is a case which is in point, and I think that the costs of the commissions should not be allowed to the defendant in the case, but should be taxed and set off against his costs in the cause.

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THE

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VOL. V. TORONTO, JULY 15, 1907. No. 8.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. APRIL 6TH, 1907.

CHAMBERS.

DOMINION BANK v. FREEDT.

Practice—Motion to Dismiss Action for Want of Prosecution —Notice of Motion or Summons—Discharge of Summons —Costs.

Application by defendant under Rule 169 of the Judicature Ordinance for an order dismissing the action for want of prosecution.

W. A. Nisbet, Moosomin, for defendant.

T. D. Brown, Moosomin, for plaintiffs.

WETMORE, J.:—The application was made by summons. Objection was raised at the return of the summons that I had no power to entertain the application by summons. Rule 169 provides that the defendant may on notice apply for and obtain the order. Rule 458 of the Ordinance provides that "applications for summonses, rules, and orders to shew cause and applications authorized to be so made by these rules may be made ex parte. Other motions in Court shall be by notice of motion, and other applications in Chambers by summons, except where otherwise specially provided." Now, in applications of this character it is provided that they should be made otherwise than by summons, and that procedure so prescribed must be followed. I held

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as far back as 20th February, 1894, in Fortescue v. Bell, that where the Ordinance prescribes that an application should be made by notice, I have no jurisdiction to proceed by summons. This application therefore must be refused, and refused with costs.

The error was not a very grievous one, and I might, under ordinary circumstances, be disposed to order a lump sum to be paid for costs, but I think the defendant was a little bit quick in making this application. The action is one that would be naturally tried at Oxbow. The cause was at issue, say, about the middle of October last; the first court at which it could have been tried was the December sittings at Oxbow. It was not set down for trial then, and the plaintiffs' advocate has accounted for not so having it set down; with that, however, the defendant or his advocate would have nothing to do, and I assume that they were not aware of his reasons for not setting it down. But the advocate must have known that the plaintiffs were proceeding with the action and had no intention of abandoning it. They had taken out an order for the examination of the defendant for discovery, and had actually examined him on 27th February, a few days before the summons on this application was taken out. Under such circumstances, I have no hesitation in ordering this application to be dismissed with costs generally.

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Ottawa, March 1st, 1907.

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